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ABSTRACT

This monograph addresses issues concerned with the disproportionate representation of minority students, especially black students, in special education programs. It reviews the nondiscrimination legal requirements and protections as well as litigation in the federal courts. After a "warm-up exercise" in the form of a pre-test, an overview section reviews the history of disproportionate representation of minority students in special education. Part 2 discusses legal standards that require nondiscrimination in the assessment, classification, and placement of children with disabilities and reviews existing case law. Part 3 emphasizes the need to distinguish between different ways to analyze program representation statistics and notes that some of the problems of disproportionate minority representation arise from misunderstandings of these statistics. Part 4 reviews a variety of criteria and guidelines for analysis and decision-making. Part 5 looks at the prevention of disproportionate minority representation through court orders, reevaluation projects, the use of alternative criteria and assessment procedures, and prereferral intervention. Part 6 considers possible ways to change the acceptability and ensure the effectiveness of special education. Part 7, a summary, stresses that positive outcomes for students should be the ultimate criteria underlying nondiscrimination in assessment, placement, and services. Appendices provide guidelines for assessment and problem solving from Iowa and federal regulations. (Contains 122 references.) (DB)

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Disproportionate Minority Representation in General and Special Education: Patterns, Issues, and Alternatives

October 1997

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Warm-Up Exercise

There are numerous misconceptions about disproportionate minority representation in general and special education programs. The following items are designed to identify some of the more common misconceptions. Readers are encouraged to take this informal quiz before reading the remainder of this paper. Items 1-10 are in a True-False format.

1. Currently, the federal Courts have banned all uses of IQ tests with black students in California.
2. The degree of overrepresentation in special education is nearly the same for all economically disadvantaged groups in the U.S. (Hispanic, Black, and Native American).
3. A large proportion of black students are in special education programs, that is, one-third or more depending on the district and state.
4. The degree of overrepresentation of black students in special education has increased over the past 20 years.
5. Overrepresentation of children of color in special education is restricted to the judgmental disabilities such as MMR, SLD, and SED.
6. Most of the court cases dealing with disproportionate minority representation in special education programs have been decided in favor of plaintiffs representing minority clients.
7. The federal Office of Civil Rights which administers Section 504 of the Rehabilitation Act of 1973 is in the U.S. Department of Justice.
8. The definition of nondiscrimination that appears in federal regulations requires proportionate representation of all groups in special education and in programs for the gifted and talented.
9. The percent of program by group and the percent of group in a program are usually nearly the same in cases involving disproportionate special education representation.
10. Judge Peckham, the Larry P. trial judge, reiterated in 1992 the view that the Larry P. case was primarily about biases in IQ tests and the harmful effects of IQ testing.
11. At the time of the Larry P. initial injunction in 1972, 10% of the California school enrollment was African-American; however, 25% of the California mild mental retardation (MMR) enrollment was African American. Now, estimate the per cent of African-American students in MMR programs.

    A. 0.5%
    B. 1%
    C. 3%
    D. 10%
    E. 25%

The answer key appears as an endnote on page 147.

Part I: Overview

Representation of minority students in special education programs might be called the quintessential special education dilemma. The effect of the disproportionate representation is that additional resources are provided to support the education of individual minority children experiencing academic difficulties. Disproportionate representation also means that more minority children are diagnosed as disabled and placed in special education programs. Depending on program quality and the degree of stigma associated with being diagnosed as disabled, special education placement may or may not be in the best interests of the individual student. Thus, both stigma and the quality of the general and special education programming are critical influences on whether disproportionate representation is in the best interests of individual children.

In this paper the nondiscrimination legal requirements and protections will be reviewed along with the litigation in the federal courts regarding the disproportionate representation of minority students in special education programs. Data on disproportionate representation will be examined with an emphasis on the importance of distinguishing between different ways to analyze program representation statistics. Indeed, at least some of the problem of disproportionate minority representation in special education arises from misunderstandings of these statistics. Then, attention will turn to examining different criteria for making judgments about whether a particular pattern of minority and non-minority representation constitutes a problem that should be examined further.

If minority representation patterns are problematic according to some criterion, the next steps are to: a) examine if the minority disproportionate representation can be prevented through the use of general education interventions and options; and b) determine if the minority disproportionate representation can be defended according to an equal treatment criterion of fairness and multitrait-multimethod principles of assessing students needs and eligibility for special education programs. Finally, methods for evaluating the effectiveness of special education interventions are presented as part of consideration of the outcomes of special education classification and placement decisions for students with disabilities.

Many local school districts and state departments of education have ignored the issues associated with disproportionate minority representation despite awareness of the nondiscrimination requirement and the possibility of being investigated by the federal Office for Civil Rights (OCR). The thought for some administrators appears to be that if we see no evil, no one else will either. And

for most, this approach has been successful, at least in the sense that few districts are investigated by OCR because of disproportionate minority representation.

The persons involved with the panel that reviewed this document represented broad constituencies of Iowa school administrators, parents, and special educators. The panel members deserve commendation for their willingness to address the disproportionate representation issues in a proactive and constructive manner. All focused on the paramount issue, What is best for children and youth?, and How can general and special education ensure positive outcomes for all children and youth and, especially, for economically disadvantaged minority children and youth?

It is important to note that disproportionate minority representation in general and special education programs is not a new phenomenon. In fact, concern for disproportionate minority representation predates modern special education, assuming that the modern era began about 20 years ago with the enactment and implementation of legal mandates to provide appropriate educational programs for all students with disabilities in the least restrictive environment (Artiles & Trent, 1994). Dunn (1968) authored one of the best known of the early critiques of disproportionate minority representation in special education. Dunn's scathing critique of special education programs for students with MMR established, for many, the conclusion that special education programs for students with MMR were ineffective.

In view of the long-term existence of disproportionate minority representation it is not surprising that we must acknowledge that there are no easy solutions, quick fixes, or straightforward and noncontroversial remedies. In fact, all current remedies are costly, from disproportionate minority representation in special education programs which, on average, cost 2.3 times the amount spent in general education programs (Moore, Strang, & Schwartz, 1988; Parrish & Chambers, 1996) to additional interventions in general education, to simply ignoring the learning and behavioral problems which, without effective interventions, almost always lead to poor individual outcomes. Anyone seeking simple solutions would best avoid the disproportionate minority representation in special education discussion.

In addition to being persistent, disproportionate minority representation in special education has been enormously controversial, divisive, and costly. Literally millions have been spent on litigation, compliance reviews, and continuing education programs for education professionals. The outcomes of all these efforts have been, in my judgment, mixed at best. On the positive side, educators and

psychologists have been sensitized to possible biases in assessment, the due process rights of parents, and the importance of effective programming in general and special education for all children and youth. In particular, certain discriminatory practices brought to light in litigation in the late 1960s were soon discontinued in the states and districts involved. One result of the early cases was the development of a wide array of protections against misclassification in state and federal legislation by the mid-1970s. These protections were and are good professional practices that are beneficial to all children and youth. As explained in a later section, these reforms had the effect of eliminating special education overrepresentation with Hispanic and, for the most part, with Native American Indian children and youth as well.

The negative features of the disproportionate minority representation discussions since the early 1970s are subtle, but no less real. First, there has been an unfortunate focus on the simple proportions of students in various programs, assuming that the proportions would be equal if nondiscrimination was achieved by educational agencies. Secondly, much of the attention has been focused on **how** children and youth were placed in such programs with insufficient attention devoted to the educational needs of the children, general education alternatives to special education placement, and the effectiveness of special education programs. Perhaps the most unfortunate circumstance of all was the acceptance by special educators and many others of the assertion that special education programs were ineffective and harmful to minority children placed in these programs.

Readers are urged to become familiar with a National Academy of Sciences Panel Report entitled, *Placing Children in Special Education: A Strategy for Equity* (Heller, Holtzman, & Messick, 1982). This panel studied in depth the issues surrounding the overrepresentation of minority children and youth in special education programs. A number of their recommendations will be emphasized in a later section of this paper. The single most important conclusion of that panel was captured in the preface to the panel report.

> Our initial question 'What are the causes of disproportionate representation of minorities and males in special education' became "Why is disproportionate representation of minorities and males a problem?" (Heller et al., 1982, p. *x*)

The "Why is it a problem?" perspective directs attention to broad issues of the quality of general education programming and the efficacy of special education interventions as noted by an earlier committee sponsored by the Iowa Department of Education as well as a report distributed by the Bureau of Special

Education to special educators in Iowa (Reschly, 1978, 1981). A table from that report appears in Appendix A. Although much has occurred since those earlier reports, particularly in the realm of litigation, little has changed regarding research on the factors related to overrepresentation. Overrepresentation continues to be observed throughout the U.S., with the most concern expressed about disproportionate minority representation in the category of MMR and placement outside of general education in special classes.

There has been, however, an important change in the composition of the sociocultural groups over-represented in special education. Contrary to the patterns that were thought to exist in the late 1970s and early 1980s, we know today that overrepresentation is largely a phenomenon experienced by African-American and, to a lesser extent, Native American Indian children and youth. It now is well known that Hispanic and Asian-American children and youth are under-represented in special education, a pattern that probably existed by the late 1970s, but was not recognized until later in the 1980s.

The final issue for this overview, then, is to consider why overrepresentation of African-American children and youth in special education has re-emerged as a significant issue in the 1990s. Answers to that question likely will be clearer in a few years when social historians can weigh various trends in our society; however, several possibilities exist. First, the issue never really went away. Litigation on disproportionate minority representation continued in the federal courts throughout the 1970s, 1980s, and 1990s. This litigation has served as a powerful stimulus to further considerations regarding overrepresentation.

Second, one of the issues that motivated the plaintiffs in the most famous of the overrepresentation court cases, *Larry P. v. Riles,* initiated in 1971 by the Bay Area Association of Black Psychologists, has re-emerged in the popular press. Once again, there is a widely discussed and disputed interpretation of differences among African-American and white persons on cognitive tests as representing, at least in part, hereditary differences (Herrnstein & Murray, 1994). In the earlier period, it was Jenson (1969) and Shockley (1971), also academics like Herrnstein and Murray, who proposed a widely discussed hereditary theory to explain racial differences in ability and achievement tests. Recognition of racial differences of various kinds, including different rates of special education representation, has become much more controversial again as our society confronts differences among racial groups and attempts to rectify these differences within our sociopolitical commitments to fairness and equity for all.

Whether the attention to overrepresentation today is a revival of concerns in the 1970s or a reaction to other influences, it is clear that more attention is paid to this issue today than

at any time since the late 1970s and early 1980s. The increased activity is apparent in reports to Congress (U.S. Department of Education, 1992, 1994) in which summaries were presented of OCR surveys of the racial composition of various educational programs in a large sample of U. S. school districts. The OCR survey results as well as the findings in a large scale study funded by the federal Office of Special Education Programs (OSEP) pointed to the same conclusion: African-American children and youth were substantially over-represented in special education. Other groups, particularly Hispanic-American and Asian-American children and youth were significantly underrepresented in special education. Neither study attempted to explain the disproportionate minority representation in special education; however, two further developments reflect OSEP's concerns about these results. First, OSEP requested a study by the National Academy of Sciences of the uses of IQ tests in special education and alternatives to IQ tests (National Academy of Sciences, 1996; Reschly, 1996). A preliminary report of that study has been widely distributed. A second OSEP initiative involved funding of the National Association of State Directors of Special Education to examine policy issues and practice alternatives in relation to disproportionality in special education. Results of these projects will be discussed in later sections of this paper

A further indication of increasing interest in disproportionate minority representation is the federal Office for Civil Rights (OCR) announcement that greater attention will be devoted to minority overrepresentation in compliance reviews of school districts' implementation of the nondiscrimination requirements of federal statutes and regulations. According to a high ranking OCR official, Jean Peelen, one of the six current OCR priorities is "minorities and special education" (*Urban Special Education Leadership Collaborative,* 1995). Peelen provided these examples of discrimination that have been identified in OCR compliance reviews: a) more minority students are placed in overly restrictive placements, b) differential use of IQ scores with instances of IQ tests being the de facto sole instrument for determining eligibility with minority students, but a full multifactored assessment was carried out with non-minority students, and c) differential application of prereferral strategies on the basis of race.

Peelen acknowledged that the higher incidence of poverty among African-American students might cause a higher incidence of disabilities; however, she noted that there was only a slightly higher rate in the nonjudgmental categories of disabilities, e.g., visual impairments, multiple disabilities, but a substantially higher rate among the judgmental disabilities such as MMR, SLD, and SED. According to Peelen, OCR focuses on evidence of differential treatment on the basis of race or

ethnicity using "simple", straightforward statistics. As noted later, these simple, straightforward statistics often are more complex than they appear. Finally, although OCR has no position on the use of IQ tests, they continue to be concerned about the uses of tests as gatekeepers at all levels of education, from special education to medical school admissions.

Overall, OCR's concerns about special education, as well as the key to ensuring fairness to all students, is captured well in the following quote:

> The more special education becomes **not** a place, but an educational process, the less interested we will be from a civil rights perspective. In many places special education has become a segregated setting, without access to quality, high standards education. Our interest will fade when special education and regular education have gotten together, and are all about the same thing, which is high standards education. (p. 6)

This increased scrutiny by OCR undoubtedly has prompted greater awareness among special educators of disproportionate minority representation in special education. The concern of local educators often is quite uncomplicated: a) Do we have a problem? And, if we do, b) What should be done about it? This paper is devoted to answering those questions.

Part II: Legal Standards Relevant to Disproportionate Representation

In this section, legal standards that require nondiscrimination in the assessment, classification, and placement of children with disabilities are discussed. The origins of the nondiscrimination are discussed first, followed by a summary of nondiscrimination case law. The section then branches into a brief summary of the case law and implications for special education **or** an extensive discussion and analysis of the case law. Readers wishing only an overview of the case law are encouraged to follow the first option while those interested in a more thorough discussion and analysis of the case law should pursue the second option.

Origins of the Nondiscrimination Principle

Nondiscrimination is a fundamental principle that is applicable to virtually everything that is done in a school setting. Many origins exist for the nondiscrimination principle. For the last 130 years, nondiscrimination in educational settings has been required by the U.S. Constitution. Although education is one of the areas of authority that is considered to be reserved to the states by the 10th Amendment to the Constitution, much of what special educators and school psychologists do, "... directly and sharply implicates the Constitution" (Bersoff & Hofer, 1990, p. 939). The constitutional principle most relevant to nondiscrimination in education is the 14th Amendment's guarantee of the "*... equal protection of the laws.*" Equal protection restrains states from treating persons differently absent a good reason for the differential treatment.

Schools, as creations of state governments, clearly are subject to meeting the equal protection principle. The meaning of this principle has, however, changed over the course of our history. A century ago, segregation of the races under the "separate but equal" legal meaning of equal protection was endorsed by the U.S. Supreme Court (Plessy v. Ferguson, 1896). By 1954 equal protection analysis compelled a different conclusion; specifically, "separate but equal is inherently unequal" (*Brown v. Board of Education,* 1954) (*Brown*), leading eventually to the elimination of state laws requiring racial segregation of schools. Since the mid-1950s the courts have increasingly struck down state laws that provided for or allowed differential treatment in the public schools on the basis of race (*Brown, 1954*) sex, or disability (*Mills v. Board of Education,* 1972; [*Mills*]; *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 1972 [*PARC*]). The latter cases have been an especially important influence on special education and school psychology.

The equal protection principle of the U.S. Constitution has been integrally involved with the creation of modern special education. Equal protection was the basis for establishing the rights of students with disabilities to appropriate educational services (Mills, 1972; PARC, 1972) **and** as the basis for protecting minority children from inappropriate classification as disabled (*Diana v. State Board of Education*, 1970; *Guadalupe Organization v. Tempe Elementary School District No. 3*, 1972).

The case law on equal protection and students with disabilities was then codified into state and federal statutes guaranteeing appropriate education and protection against improper classification and placement. The nondiscrimination principle as it applies to students with disabilities has two prongs: First, it guarantees the right to assessment that meets certain standards and, second, it guarantees nondiscrimination in testing, evaluation and placement procedures.

> ... testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or other mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child. (This language first appeared in the *Education of the Handicapped Act.* (1975, 20 U.S.C. 1400-1485). The same language now appears in the *Individuals with Disabilities Education Act* [1991. 20 U.S.C. 33.1412(5)(C)]

Two federal laws and their accompanying regulations guarantee the rights of children and youth with disabilities to an appropriate education in the least restrictive environment (*Individuals with Disabilities Education Act* [1991. 20 U.S.C. 33.1412(5)(C)]; and the *Rehabilitation Act of 1973*, (20 U.S.C. 1405; 29 U.S.C. 794; 34 CFR 104 to 34 CFR 105). Both require nondiscrimination as well as other protections in the assessment, classification, and placement process. These requirements appear in the IDEA regulations as the Protection in Evaluation Procedures provisions, reprinted in this paper in Appendix B. The Section 504 regulations regarding evaluation, classification as disabled, and placement of students are slightly less detailed than the comparable IDEA regulations, but, otherwise, are identical as noted in Appendix B.

Although the statutes and regulations establish a clear mandate for nondiscrimination, implementation of the nondiscrimination principle has been extremely difficult because no

definition of racial or cultural discrimination has ever appeared in the regulations. Moreover, unlike the equally elusive IDEA guarantee of an "appropriate education" to all students with disabilities, nondiscrimination has never been defined in a court case that was applicable to the entire United States Absent a definition of nondiscrimination and criteria to guide decisions on what is, and is not, discriminatory, practitioners and researchers are left to the myriad of **implicit** definitions used by federal and state agencies in compliance reviews and the courts in resolutions of litigation involving allegations of discrimination.

Choice Point: Readers interested in an abbreviated treatment of the nondiscrimination case law should proceed with Option 1. Readers interested in a more thorough treatment of the case law should resume reading at page 17.

[1]Option 1: Abbreviated Treatment of Case Law

General Education Case Law

Allegations of discrimination in assessment, classification, and placement have been addressed in the federal courts over the last three decades. Important cases have been decided in the contexts of general education grouping or tracking and special education classification and placement. Courts in different federal circuits have reached markedly different decisions on similar issues. No case has been decided by the U.S. Supreme Court leaving the contradictory decisions in the circuit courts of appeal uncorrected.

Allegations of discrimination in general education ability/achievement grouping or tracking due to African-American overrepresentation in lower tracks and under-representation in higher tracks have been addressed in a number of federal court cases. The two most prominent cases, *Hobson v. Hansen*, (1967, 1969) and *Marshall v. Georgia* (1984, 1985), yielded contradictory decisions that were upheld on appeal at the circuit court level. In *Hobson*, an ability grouping scheme based largely, according to the court opinion, on the results of a group-administered ability test, in the Washington D.C. public schools was eliminated because African-American students were disproportionately represented in the tracks. In sharp contrast, *Marshall* was decided in favor of plaintiff school districts in Georgia who were allowed to continue the use of a grouping scheme which the court understood to be based on achievement. Key differences in the cases are summarized in Table 1.

1. Persons interested in a more thorough treatment of the case law should go to page 17 at this point.

Table 1. Summary of Key Differences in Hobson and Marshall

Program Characteristic	Hobson	Marshall
Conception of Basis of Placement	Innate Ability	Acquired Achievement
Assignment toTracks	Tests Alone	Multiple Criteria Including Student and Parent Preferences
Relationship of Disproportionate Classification and Placement to Historical Patterns of Segregation	Perpetuates	Ameliorates
Relevance to Instruction/Content	Unrelated	Closely Related
Changes in Placement	Rigid/All Subjects	Flexible/Subject Based
Educational Opportunities and Resources	Poorer and Inferior	Equal or Better

Special Education Nondiscrimination Case Law

Since 1979 there have been four trials in different federal courts addressing allegations of discrimination due to minority overrepresentation in special education programs. All cases focused primarily on overrepresentation in the classification of MMR and placement in self-contained special classes. Defendant school districts and state departments of education prevailed in three of the decisions, all of which permitted disproportionate minority representation in special education (*Marshall v. Georgia, 1984, 1985*; *Parents in Action on Special Education v. Hannon*, 1980 (PASE); and *S-1 v. Turlington*, 1986). One case, (*Larry P. v. Riles*, 1979, 1984, 1986, 1992, 1994), was decided for plaintiffs. Although further court action in *Larry P.* is possible, it appears that the 1979 ban on IQ tests will be restricted to, "... the use of IQ tests in the assessment and placement of African-American students in dead end programs such as EMR" (*Crawford v. Honig*, 1992 and *Larry P.*, 1992, p. 15).

The special education nondiscrimination litigation is complex, involving numerous implicit assumptions and underlying issues (Elliott, 1987; Reschly, 1982, 1996). Addressing the following issues is crucial to the development of special education programs that are acceptable to minority advocates:

a) the **nature-nurture controversy** and hereditarian views of differences between racial groups (Herrnstein & Murray, 1994; Jensen, 1969) and the efforts of black psychologists to refute these views in the courts (Dent, 1976, 1993; Hilliard, 1980, 1983, 1992; Jones, 1988; Jones & Jones, 1987; Jones & Wilderson, 1976); b) the **meaning of IQ test results** regarding the degree to which they are predetermined by genetic factors, that intelligence is unitary and is measured directly by IQ tests; c) the **role of tests in placement decisions** (primary determinant of classification or secondary to severe, chronic achievement problems); d) **meaning of mild mental retardation** (does "true" MMR require evidence of comprehensive incompetence, permanence, and biological anomaly; e) **effectiveness of MMR special classes** (whether they were dead-end programs that provided few opportunities or programs offering specialized instruction tailored to the abilities of the children placed therein); and f) **meaning of bias in testing and assessment.** For example, one way to address the first issue is to clearly state that overrepresentation is due to poverty, not due to inherent differences between ethnic or racial groups. Dealing with these issues was crucial to the successful defenses of disproportionate minority representation in the *Marshall, PASE,* and *S-1* cases.

The basic issues also were framed very differently in the cases. These differences are summarized in Table 2.

Table 2. Differences in Treatment of Issues in Larry P., Marshall, and S-1

Issues	Larry P.	Marshall and S-1
Role of IQ Tests	Primary and Pervasive	Secondary to Chronic Low Achievement
General Education	Ignored by Court Not Emphasized In Defendants Case	Multiple General Education Interventions Prior to Referral Documented by Defendants
Adaptive Behavior	Out of School Setting with No Emphasis On Practical Cognitive Skills	Multiple Contexts Including the School Setting and Practical Cognitive Skills
Overrepresentation Data	Not Understood by Court; Not Clarified by Defendants	Understood by Court; Clarified by Defendants
Overrepresentation In Other Program	Not Addressed by Defendants	Documented and Stressed by Defendants
Use of Authoritative Sources	Not Emphasized	Emphasized In All Aspects of Defense, Especially Grossman (1983) and Heller et al., 1982
Explanation for Over-Representation	"Agnostic" No Explanation	Focused on Effects of Poverty, Emphasizing Overrepresentation of Economically Disadvantaged Students in Special Education Regardless of Race or Ethnicity

Implications of Legal Requirements and Case Law

1. Nondiscrimination as a principle is firmly established at several layers of legal requirements, including federal statute, federal regulations, state statute, state rules, and case law.
2. The meaning of nondiscrimination, has not been established definitively in case law, nor through criteria in federal or state compliance monitoring. Two ***implicit*** conceptions are apparent in case law and compliance monitoring: equal treatment and equal results (see later section).
3. Case law precedents exist for both conceptions of nondiscrimination. Three federal court cases were decided using an equal treatment conception of nondiscrimination. One case was decided using an equal results conception of nondiscrimination.
4. No cases involving the nondiscrimination principle and overrepresentation of minority children and youth in special education have been decided in the Eighth Circuit (the circuit that includes the State of Iowa).
5. The minimum requirement for nondiscrimination, based on a wide variety of evidence, is equal treatment. The essence of equal treatment is comparable decisions, processes, and outcomes for persons who have similar characteristics and needs.
6. Failure to meet the equal treatment conception of nondiscrimination places a publicly-supported educational agency at great risk in compliance monitoring and litigation. Unequal treatment of minority students, especially if the unequal treatment results in services that are poorer in quality, virtually guarantees that the educational agency involved will lose a court challenge or a compliance review.
7. Case law on nondiscrimination involving disproportionate minority representation appears to have been markedly influenced by the nature of the procedures to assign students to different programs **and the quality of the programs**. Disproportionate minority representation in programs with fewer resources or limited opportunities has been forbidden in federal court opinions. In contrast, disproportionate minority representation has been permitted in programs that had more resources than

other alternatives and outcomes reflecting expanded skills and increased opportunities.

8. The physical location of the program and the amount of interaction with general education students and curricula also have influenced federal court decisions in nondiscrimination cases. Generally, greater involvement with general education and flexible assignments of students to instructional groups are viewed favorably by the federal courts.
9. Disproportionate minority representation in self-contained special education classes using a markedly different curriculum, because of the association with impermissible segregation of students by race, is less likely to be permitted by the federal courts.
10. The basis for classification and placement decisions in agencies with disproportionate minority representation also influences the outcomes of federal court cases alleging discrimination due to disproportionate minority representation in special education. Classification and placement practices that rely primarily on, or appear to rely primarily on, tests such as IQ measures are much less likely to be permitted in federal court cases. Classification and placement decisions based on a broad variety of information, including documentation of multiple attempts to resolve problems in general education, are more acceptable to the federal courts and to compliance monitoring agencies.

End of Section II
Option 1 Readers
Please go to Section III on page 49

Readers Following Option 2
(Extended Discussion of Case Law)
Should Continue Reading Here

Litigation:General Education Disproportionate Minority Representation

Litigation addressing alleged discrimination in assessment, disability classification, special education placement of ethnic or racial minorities was, in retrospect, an almost inevitable outcome of the landmark *Brown* (1954) Supreme Court decision. The landscape for this litigation has changed over time; however, the fundamental issue from the beginning has been overrepresentation of minorities in some tracks or programs and under-representation in others. The use of tests in educational classification and placement decisions has been controversial; indeed, different courts have, on essentially the same facts, either banned or upheld the use of the same tests.

Bersoff (1979) described the judicial scrutiny of educational tracking and differential placement using group administered achievement and ability tests in southern school districts as a means to delay or avoid school desegregation. Initially, these tracking plans, based on group-administered tests, were allowed to exist by the federal courts because,

> There is no constitutional prohibition against an assignment of individual students to particular schools on the basis of intelligence, achievement or other aptitudes upon a uniformly administered program, but race must not be a factor in making the assignments. However, this is a question for educators and not courts. (*Stell* p. 62, as cited in Bersoff, 1979)

This conclusion is consistent with an equal treatment notion of fairness or nondiscrimination: disproportionate classification and placement outcomes are acceptable as long as the **same** decision-making procedures are applied regardless of race.

The courts in the first decade of the post-Brown period allowed disproportionate classification and placement based on the results of tests on which minority students performed more poorly than non-minority students. The differences in test results and classification/placement outcomes were permissible as long as **individual** minority and non-minority children were treated in the same way, for exa mple, making the same tracking assignment given the same test score regardless of race (Bersoff, 1979). During this period there is clearly evident the judiciary's deference to educators in matters of assessment methodology and classification/ placement decision-making; however, that deference changed significantly beginning with a landmark case in the nation's capitol.

Hobson v. Hanson (1967, 1969). *Hobson* was the first direct challenge to the use of standardized tests as part of a tracking system. According to documents submitted by the district to the court, the Washington, DC public schools instituted tracking soon after desegregation to improve educational opportunities for black students who exhibited a high incidence of achievement problems. The tracking procedures depended on a variety of information including grades, teacher recommendations, and various standardized tests of achievement and ability. The effect of the tracking system was to create disproportionate representation of white and black students in the upper, middle, and lower ability tracks. Bersoff (1979) cited data indicating that while black students constituted about 90% of the total Washington, DC student population, they constituted 95% of the students in the lowest track (Bersoff, 1979, p. 47).

Plaintiffs sued the district on the basis of the equal protection right alleging

that tracking led to unequal educational opportunities for black students. Plaintiffs alleged that the lower track programs had poorer facilities, inferior instruction, and limited curriculum or course offerings. Plaintiffs claimed that the disadvantages of the tracking system far outweighed any possible benefits.

Hobson was decided by a court opinion after a lengthy trial. The defendants' case depended heavily on the testimony of Roger T. Lennon, then Vice President and Director of Test Development for Harcourt Brace and World, the publisher of the Otis Quick Scoring Mental Ability Test (now the Otis-Lennon School Ability Test). The use of the Otis as part of the basis for determining ability groups became the principal issue in the trial. Lennon's testimony (*"Testimony of Dr. Roger T. Lennon...,"*1966) provided a revealing portrayal of the difficulty in explaining psychological and educational assessment in judicial proceedings as well as an excellent primer on assessment issues and concepts of bias.

Judge Skelly Wright acknowledged that tracking might be **reasonably** related to a legitimate need within an educational setting and that it might be **rationally carried out** through the use of standardized tests. Thus, Judge Wright implied that tracking involving standardized testing might meet the requirements of the nondiscrimination principle despite disparate impact on minority students.

Judge Wright concluded tests, especially the Otis ability test, were the most important determinants of tracking decisions. He then turned to the question of whether the Otis accomplished what it was required to do in order to meet the test of a rational means to carry out a legitimate function. Judge Wright framed the question in terms of whether the Otis assessed **innate** ability to learn. If it did, then the tracking system would be acceptable; if not, the tracking procedure could not be accepted.

Judge Wright observed that all expert witness testimony, including that of defendant's experts, acknowledged that presently available tests including those used by the Washington, DC schools, did not measure innate ability. All witnesses acknowledged the effects of environmental influences on test performance and all conceded that economically disadvantaged black students probably did not have the same opportunities as middle class students to learn the information or problem solving skills required on the test. Judge Wright concluded that the ability measure was seriously flawed because it failed to assess innate ability, and resulted in students being placed, "on traits other than those on which the classification purports to be based" (*Hobson*, 1967, p. 511). Judge Wright then enjoined the school from further use of this tracking system because he found it to be inflexible, stigmatizing, and associated with unequal resources with no compensatory educational benefits.

Hobson established an extremely important legal precedent concerning the use of standardized tests in situations where disproportionate placement might result. Judge Wright did not ban disproportionate outcomes as such, but rather established a nearly impossible criterion for the acceptance of tests as part of a placement process where disproportionality resulted. Wright apparently understood tracking to be based on innate ability and a test acceptable for use in tracking decisions would, likewise, have to reflect innate ability. The effects of *Hobson* were to focus on classification/ placement criteria and procedures, not on outcomes for students or on the alternatives to various tracking systems. The criteria established by Wright concerning ability tests made it virtually impossible for any tracking system using an ability measure to survive judicial scrutiny. The reasoning in *Hobson* was essentially a tautology, tracking uses innate ability, tests are used in tracking students, tests do not measure innate ability, therefore, tracking if based on tests is not acceptable.

Marshall v. Georgia (1984, 1985). *Marshall* was a class action suit filed in 1981 on behalf of black students in Georgia who allegedly were improperly tracked in regular education and disproportionately classified as MMR in special education. The achievement grouping side of *Marshall* is discussed in this section with extensive analysis of the special education side in a later section.

The defendants in *Marshall* were 13 poor, rural districts and the State of Georgia. The legal basis for the *Marshall* plaintiffs' challenge to regular education grouping included the Equal Protection Clause of the 14th Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act.

The achievement grouping by local districts, a practice implicitly approved by the state, resulted in disproportionate impact on black students who were over-represented in lower tracks and underrepresented in higher tracks. In contrast to the *Hobson* Court, the *Marshall* Court accepted defendants' arguments concerning achievement grouping even to the point of acknowledging probable benefits to black students and, perhaps, contributing to overcoming the prior effects of segregation. Some of the reasons for the decidedly different view of the *Marshall* Court become apparent from a review of the plaintiffs' and defendants' cases.

The plaintiffs' case depended heavily on statistical evidence concerning disproportionality and complex statistical analyses relating race, socioeconomic status (SES), and other factors to achievement. Indeed, Judge Edenfield characterized the evidence in the case as a "statistical battleground" (*Marshall*, 1984, p. 97). Plaintiffs' expert witness concluded that black students were substantially over-represented in lower achievement

groups and substantially underrepresented in higher achievement groups. The court agreed with this conclusion, acknowledging that, "some factor correlated with race is influencing the defendants' classroom makeup" (*Marshall*, 1984, p. 97). Two other experts for the plaintiffs contended that achievement grouping was linked to segregation in southern schools and that different educational experiences were, in all likelihood, provided at the different levels, with higher groups receiving instruction at a faster pace and a higher cognitive level while the lower groups received instruction at a slower pace and lower level of reasoning. These differences in instruction were seen as further aggravating the effects of biased attitudes among teachers and others in the educational system. The grouping practices were seen as leading to different educational experiences for black and white students which, in turn, caused the differences in the achievement of black and white students. In short, the plaintiffs saw grouping as the cause, not merely the result of, black-white differences in achievement.

The remedy advanced by plaintiffs for the alleged harm associated with grouping was random assignment of students to classroom groups. Documents as well as testimony by plaintiffs urged the court to adopt any student assignment system that would result in proportionate representation of black and white students in all types of classroom groups.

The Georgia Department of Education (GDE) and the defendant school districts acknowledged the disproportionate placement of black and white students in the classroom groups, but sharply rejected plaintiffs' inferences and conclusions regarding the effects of grouping on black students. First, the defendant school districts indicated achievement grouping was used primarily in the elementary grades, particularly grades K-6. Little or no formal grouping was carried out at the high school level where course selections by students typically resulted in informal grouping, (e.g., higher achieving black and white students were likely to take more demanding courses like algebra or trigonometry while lower functioning black and white students were likely to enroll for less demanding courses such as general mathematics). Defendants then focused most of their effort in court on justifying grouping practices at the elementary grades.

All of the defendant districts argued that a combination of objective and judgmental criteria were used to constitute classroom groups. Although somewhat different procedures were used in the different districts, all ... districts emphasized level of achievement, specifically, skills level within the **basal series**, as the most important influence on achievement grouping. Daily classroom performance as well as various assessment procedures provided by the basal series, along with teacher judgment and the results of other

achievement tests, were used to determine assignment to groups. Group administered aptitude or ability tests, the principal basis for constituting groups according to the *Hobson* Court, were not used at all or received considerably less emphasis than actual classroom achievement. The court's acceptance of this line of testimony was reflected in the conclusion, "A combination of academic indicators was taken into consideration with primary emphasis being placed on a child's actual performance in the basal instructional series" (*Marshall*, 1984, pp.18-19).

The second critical point in defendants' case was the claim of flexibility in the grouping assignments. The procedures used by several of the districts involved "block grouping" which meant that a student's assignment could change by subject area. In contrast, the *Hobson* case involved less flexibility with students who were, apparently, assigned to the same track for all academic instruction. Furthermore, the Georgia districts were able to present convincing evidence concerning movement between levels.

The third critical point advanced by the defendants was the nature of the instruction provided through the achievement grouping procedures. Since the achievement groups were based on skill levels in the basal series, defendants argued that the grouping procedures allowed greater individualization of instruction. This individualization of instruction appeared to be even greater for students in the lowest level, most of whom were also in the federally funded Chapter I and the state funded Georgia Compensatory Education Program. The defendant districts claimed that achievement grouping led to greater, rather than less, instructional quality and enhanced opportunity to learn, particularly for students in the lower tracks.

The final critical aspect of the *Marshall* defendants' case was the assertion of beneficial outcomes associated with achievement grouping. Several defendant districts provided evidence indicating improved performance on the Georgia Criterion Referenced Test. The improved performance was especially apparent for lower performing black and white students. These beneficial effects of achievement grouping were even seen by the court as alleviating, ". . . the past results of past segregation through better educational opportunity for the present generation of black students" (*Marshall*, 1984, p. 100).

Defendants also pointed out a clear discrepancy in the plaintiffs' assertions: Plaintiffs did not dispute the disproportionate enrollment in Chapter I. Black students constituted about two-thirds of the Georgia enrollment in the Chapter I but only 36% of all students in Georgia were black. Defendants suggested that overrepresentation in the lower achievement groups was virtually identical to the pattern and degree of overrepresentation in Chapter I and the

state compensatory education program. Defendants' experts then pointed to the obvious inconsistency in plaintiffs' case. Plaintiffs were apparently quite willing to accept overrepresentation of black students in Chapter I and compensatory education, but wanted the court to eliminate overrepresentation in the lower track of the achievement grouping. It seemed illogical to accept one kind of overrepresentation but to be severely critical of the other.

Judge Edenfield concluded that all claims by plaintiffs were based largely on supposition with little or no empirical foundation. In contrast, the court found defendant's rationale for achievement grouping to be sound and, contrary to plaintiffs' claims, ameliorative with regard to present effects of past segregation. All the plaintiffs' claims and proposed remedies concerning achievement grouping were rejected by the court.

In September 1984, plaintiffs appealed the trial opinion to the United States Court of Appeals for the Eleventh Circuit (*Georgia State Conference of Branches of NAACP v. State of Georgia,* 1985). The Eleventh Circuit unanimously upheld all of the trial court findings and rulings concerning the achievement grouping part of the case. The appeals court description of the legal test in a disparate impact case was particularly clear and instructive.

> The plaintiff first must show by preponderance of the evidence that a facially neutral practice has a racially disproportionate effect, whereupon the burden shifts to the defendant to prove a substantial legitimate justification for its practice. The plaintiff may then ultimately prevail by proffering an equally effective alternative practice which results in less racial disproportionality as proof that the legitimate practices are a pretext for discrimination. (*Marshall*, 1985, p. 26)

The Circuit Court upheld the trial court's finding that the defendants successfully refuted the plaintiffs' case by showing the educational benefits of grouping students and by convincing the court that the plaintiffs' alternative (i.e., random assignment), would not be equally sound even though it would result in proportionate representation.

A superficial reading of the trial decisions in *Marshall* and *Hobson*, or information from abstracts of the cases might suggest markedly different decisions on the same set of facts. Careful reading of both decisions and examination of the evidence presented supports a much different conclusion (Reschly, Kicklighter, & McKee, 1988a). Differences in the facts associated with the case, rather than differing judicial interpretation of the facts or the relevant law, account for the different conclusion regarding grouping of students (see Table 1).

The first significant difference in *Marshall* and *Hobson* was the

conception of the student characteristic on which grouping decisions were made: *Hobson* focused on innate ability to learn; *Marshall* defendants emphasized achievement and acquired skills. Second, The *Hobson* basis for grouping was an IQ test; In *Marshall*, grouping was based on achievement as indicated by daily work, classroom tests, and progress through basal curricula. A third difference was the successful effort of the *Marshall* defendants in establishing the direct relevance of grouping to the instruction provided. In contrast, the group administered ability measure used in *Hobson* had relatively little direct relevance to the curriculum. Assignment to levels were rigid in *Hobson*, but flexible in *Marshall* where the evidence indicated that both black and white students did change levels based on their classroom performance. Educational opportunities in terms of resources and quality of instruction also differed. A major finding in *Hobson* was the diminished resources and lower instructional quality associated with the lower levels where black students were over-represented. In *Marshall*, defendant districts were able to convince the court that greater, rather than lesser, financial resources, a lower, rather than higher, student-teacher ratio, and greater, rather than lesser, instructional quality were associated with placement in the lower levels where black students were over-represented. The *Hobson* defendants were **unable** to convince the court concerning beneficial outcomes to students, particularly to lower achieving students. Again, in sharp contrast, the *Marshall* Court was convinced that beneficial outcomes for low achieving black and white students were enhanced by the achievement grouping, a major finding that contrasts sharply with the *Hobson* reasoning.

Table 1. Summary of Key Differences in *Hobson* and *Marshall*

Program Characteristic	Hobson	Marshall
Conception of Basis of Placement	Innate Ability	Acquired Achievement.
Assignment to tracks	Tests Alone	Multiple Criteria Including Student and Parent Preferences
Relationship of Disproportionate Classification and Placement to Historical Patterns of Segregation	Perpetuates	Ameliorates
Relevance to Instruction/Content	Unrelated	Closely Related
Changes in Placement	Rigid/All Subjects	Flexible/Subject Based
Educationa Opportunities and Resources	Poorer and Inferior	Equal or Better

Recent litigation regarding tracking has followed more closely the *Marshall* than the *Hobson* precedents. Disproportionate representation of minority students in higher and lower tracks and, presumably, the methods to constitute the tracks such as tests, may still come under the scrutiny of the federal courts if, " ... such assignments are accomplished on the basis of race or for the purpose of racial segregation" (*Coalition to Save Our Children v. State Board of Education,* 1995, p. 37). In this case Judge Sue L. Robinson rejected plaintiffs claims that differential racial representation in college bound and non-college bound high school curricula constituted impermissible segregation of students because the course enrollment was clearly related to level of achievement, movement between tracks was relatively easy and largely a matter of parent and student choice, differential instruction was provided in the different tracks, and black students with achievement scores above the 75th percentile on national norms were slightly more likely than white students in the same score range to enroll for college prep classes.

Although achievement among black and white students had not been equalized in the Delaware districts involved in the *Coalition* litigation, Judge Robinson refused plaintiffs' efforts to continue the federal court supervision of the districts, a circumstance that began in the mid 1970s as part of eliminating vestiges of Delaware **de jure** school segregation. In reaching this conclusion, Judge Robinson cited a 1995 U. S. Supreme Court Decision (*Missouri v. Jenkins*, 1995) that overruled a Missouri federal District Court's insistence on the Kansas City school district's elimination of achievement differences among black and white students as a prerequisite to being relieved of federal District Court supervision. The U. S. Supreme Court in *Jenkins* also emphasized, " ... local autonomy of school districts is a vital national tradition, ... and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution" (*Jenkins*, 1995, p. 2054).

Judge Robinson ruled that the four Delaware districts in the *Coalition* litigation had complied in good faith with the court orders regarding desegregation, concluding that, "There is no credible evidence demonstrating that the differences between black and white children's success in school can be attributed to the former **de jure** desegregated school system" (*Coalition*, 1995, p. 104). She also noted, "One of the fundamental issues implicitly posed by this litigation is whether the time has come to return the focus of the public school system to matters of quality education rather than social policy" (*Coalition*, 1995, p. 103).

Summary. The review of the cases in this section established the interests of the courts in testing practices if they were part of violations of constitutional principles such as equal protection and

due process. Disproportionate minority impact of tests per se, as when tests and other information are used to group students, is legally permissible as long as the grouping practice is not a means to establish or continue segregation of educational programs by race and instructional quality and resources are not diminished by the grouping procedures. The overall facts of the situation in which tests are used, such as the allocation of resources to different tracks, rather than tests per se, determine if the testing practices are legally permissible. This will be a recurring theme in the litigation dealing with disproportionate minority special education representation.

Nondiscrimination in Special Education: 1970 to 1975 Litigation

Court cases concerning disproportionate classification and placement of minority students in programs for the MMR first appeared in about 1970. These cases involved challenges to the use of individually administered tests of general intellectual functioning (hereafter, IQ tests) by school psychologists as well as other aspects of psychological services and special education programming. Litigation involving these issues continues to the present. Typical facts in these cases were that minority students were over-represented by a factor of two to three times the rate expected from their numbers in the general population in special education programs, usually with a diagnosis of MMR with placement in self-contained classes that were largely separate from general education classrooms and curricula. Unfortunately, these data were, and continue to be, misunderstood as indicating that large percentages of minority students were tested and placed in MMR programs. In fact, the actual percentages have always been quite low (see later discussion).

***Diana* and *Guadalupe*.** Two cases in the western states of Arizona and California were the first court proceedings in which plaintiffs directly attacked the disproportionate minority representation in special education and the use of individually administered IQ tests (*Diana*, 1970; *Guadalupe*, 1972). *Diana* was a class action suit filed on behalf of nine Mexican-American children in Monterey County Schools where 18.5% of the student enrollment was Hispanic, but one-third of the MMR enrollment was Hispanic. Similar facts were established in *Guadalupe*, a class action case filed on behalf of Hispanic and Native American Indian children. Plaintiffs claimed that the overrepresentation violated the 14th Amendment Equal Protection principle, that is, unequal treatment that was not justified, as well as various civil rights statutes. Plaintiffs also claimed that the parents often were not informed that their child was referred, nor given the opportunity to participate in decision-making regarding diagnosis and placement. In addition to the violation of these basic due process rights, plaintiffs claimed that: a) the classification and placement decisions were made on the basis of IQ tests; b)

the verbally loaded IQ tests used in most cases were patently unfair to limited English proficient (LEP) students, c) the educational programs were poor; d) the psychologists were inadequately trained regarding the evaluation of LEP students, and e) the special education programs represented limited opportunities that were inadequately funded.

Both *Diana* and *Guadalupe* were settled by consent decrees, that is, the court approved a settlement negotiated between the parties. In neither case was there a trial featuring presentation of plaintiffs' evidence as well as an opportunity for the defendants (local school districts and state department of education officials) to rebut plaintiffs' claims. It is likely that so many things were wrong in the *Diana* and *Guadalupe* situations that defendants were well advised to capitulate and agree to plaintiffs' demands (Meyers, Sundstrom, & Yoshida, 1974; MacMillan, 1977; Reschly, 1979).

The consent agreements focused primarily on establishment of due process rights for parents regarding referral, classification, and placement decisions and reform in how LEP students were evaluated. Inexplicably, little attention was devoted to educational programming issues. Most of the assessment reforms are familiar and taken for granted now, for example, use of primary language, "unless it is clearly not feasible to do so," use of nonverbal measures of ability with non-English or bilingual speaking students, procedural safeguards such as informed consent, use of a variety of information (not merely a single IQ score), and, from *Guadalupe*, assessment of adaptive behavior through, but not restricted to, a visit to the student's home.

The *Diana* and *Guadalupe* consent decrees focused on the kind of IQ test used with minority LEP students (nonverbal) or the manner in which the test was administered (in the child's primary language). They did not attack testing as such. In fact, these changes in assessment virtually eliminated any overrepresentation of Hispanic or Native American children in IQ ranges below 75 or 70, the commonly used intellectual criteria to define MMR (Reschly & Jipson, 1976). Presently, there appears to be no national trend toward overrepresentation of Hispanic students in any kind of special education program (Finn, 1982; Reschly, 1996; U. S. Department of Education, 1994).

Larry P. (1972 and 1974). The *Larry P.* case first appeared on the docket of the federal District Court in the Northern District of California in November 1971 when it was filed as a class action suit on behalf of black students in the San Francisco Public Schools who were placed in MMR special class programs. This case still is not completely settled (see later discussion). Although black students constituted 28.5% of the district's overall enrollment, two-thirds of the students in MMR special classes were black. The *Larry P.* case was

developed through the efforts of the Bay Area Association of Black Psychologists (1971) who sought a ban on IQ testing as well as other changes in general and special education.

In 1972 Judge Robert F. Peckham ruled that the plaintiffs met their burden of showing disparate treatment (i. e., black students were over-represented in MMR special classes), but rejected the defendants' justifications for using IQ tests to determine MMR and special education need. A preliminary injunction was awarded to plaintiffs in June 1972, forbidding the use of IQ tests in San Francisco. This injunction was appealed by the school district and the California Department of Education (CDE) to the Ninth Circuit Court of Appeals which, in August 1974, upheld the original injunction. In December 1974, plaintiffs were awarded an expanded injunction which forbade the use of IQ tests with any black student in California, if the outcome of the IQ test use was classification as MMR.

Judge Peckham was convinced by plaintiffs' briefs and arguments that MMR special classes offered inferior educational opportunities and subjected students placed there to stigma and humiliation. Of greatest concern was the possibility that students were misidentified as MMR, "This court is thus of the view that for those students who are wrongfully placed in MMR classes, irreparable harm ensues" (*Larry P.*, 1972). Based on these conclusions, Peckham shifted the burden of proof to defendants who had to show a " rational connection" between the tests and the classification/placement purpose for which they were used, the result of which was disparate racial impact.

The defendants attempted to show that IQ tests were only a part of the basis for MMR diagnosis and special education placement and that recent reforms in California, enacted as part of the state's response to the *Diana* consent decree, provided extensive protections against misdiagnosis. Despite the evidence offered by the state and district, Peckham concluded that IQ tests were the "primary standard" and that "IQ test scores loom as a most important consideration in making assignments to MMR classes" (*Larry P.*, 1972). The CDE defendant admitted that there were racial biases in IQ tests without defining the nature or extent of the biases (a less than brilliant strategy in view of subsequent research on this question), but explained that IQ tests were the best means available for classification decisions in MMR. Peckham rejected this reasoning while acknowledging the legitimate state interest in educational classification.

> Admittedly, there is a strong need to treat truly mentally retarded children specially and to isolate them from regular classes. That need does not, however, justify depriving black children of their right to **equal protection** of the laws. Indeed, the absence of any rational means of identifying

> children in need of such treatment can hardly render acceptable an otherwise concededly irrational means, such as the IQ test as it is presently administered to black students. (*Larry P.*, 1972)

Peckham then concluded that defendants had **not** met their burden of showing a "rational connection" between the IQ testing and educational classification and placement in which there was disparate racial impact. He concluded,

> ... defendants be restrained from placing black students in classes for the educable mentally retarded on the basis of criteria which place primary reliance on the results of IQ tests as they are currently administered, if the consequence of the use of such criteria is racial imbalance in the composition of such classes. (*Larry P.*, 1972)

State and Federal Legislation Promoting Non-Discrimination

The discussion of the *Larry P.* saga is interrupted here to note the enormous influence of the placement bias litigation on state and federal legislation. The influence of the *Diana*, and *Guadalupe* consent decrees and the *Larry P.* injunctions were abundantly apparent in the state rules and the Federal Education of the Handicapped (EHA) (1975) statute and regulations that were established in the early to mid-1970s. Some of the language in the EHA Protection and Evaluation Procedures Provisions; (PEP) (34 CFR 300.530) comes directly from these consent decrees, e.g., use of native language unless it "clearly is not feasible to do so," focus on educational need rather than a single global measure such as an IQ score, and so on.

IQ Tests and Special Education Treatment on Trial: 1977-1995

Four trials in different federal District Courts between 1977 and 1986 examining overrepresentation in special education programs for students with MMR due to biases in IQ tests and other evaluation issues (e. g., conception and use of adaptive behavior) resulted in contradictory opinions on all of the basic issues. Further court proceedings in the first and most prominent of these cases, *Larry P.*, were still pending in 1996 when this paper was written. Although the facts in the cases were remarkably similar, the strategies of defendants differed markedly as did the judicial understanding of the fundamental issues.

Larry P., 1979, 1984. The *Larry P.* trial began in October 1977, concluding, following several recesses of a week or more, in May 1978. A decision on the merits of the case was issued by Judge Peckham in October 1979. That decision was then appealed to the Ninth Circuit which, on a two-to-one vote, upheld the trial opinion in January 1984.

In many ways, the *Larry P.* trial on IQ testing was for American psychology

what the Scopes trial on evolution was for biology in the 1920s. Prominent expert witnesses testified for both sides amidst considerable publicity locally and in the newsletters and journals of several national associations. Expert witnesses for the plaintiffs included George Albee, Harold Dent, Asa Hilliard, Leon Kamin, and Jane Mercer. Defense experts included Robert Gordon, Lloyd Humphries, Nadine Lambert, Jerome Sattler, and Robert Thorndike. The outcome, a ban on IQ tests with black children under certain conditions, was shocking to mainstream American psychologists (e.g., Elliott, 1987).

The *Larry P.* trial and opinion centered on the issue of bias in IQ tests against black children and youth. IQ tests were seen by Peckham as the most "pervasive," prominent and influential element of the process whereby children were classified as MMR and placed in special classes. Therefore, the opinion reviewed the extensive testimony on alleged biases in IQ tests, concluding that contemporary IQ tests were related to a pernicious, discriminatory history of standardized testing that tolerated differences between blacks and whites.

Peckham regarded tests as biased if different average scores were obtained by groups, "An unbiased test that measures ability or potential should yield the same pattern of scores when administered to different groups of people" (*Larry P.*, 1979, p. 41). Although group average differences have never been accepted as an appropriate criterion by the vast majority of psychologists, the *Larry P., (1979)* opinion cited IQ differences between black and whites, and the acceptance of tests that revealed those differences, as evidence of discriminatory practices. The mean differences criterion is problematic for many reasons, not the least of which is the fact that different groups do perform differently on cognitive measures. However, are group differences evidence of bias? Consider for a moment the fact that Asian-Americans obtain higher scores than European-Americans on mathematical reasoning tests, or the higher scores of Jewish-Americans on verbal reasoning tasks. Are these tests therefore biased against European-Americans? Judge Peckham's reasoning would compel an affirmative answer to that question.

Peckham also found IQ tests biased due to content that was tailored to the culture of white children and youth. He even cited specific items that were biased according to expert testimony, "Some of these differences have in fact become rather notorious, such as the "fight item" on the WISC tests" (*Larry P.*, 1979 p. 48). This item was cited as an example of biased content with the subtle, implicit assertion that all the items were similarly biased. Finally, in a surprising conclusion to many, Peckham concluded that the conventional IQ tests such as the Wechsler Scales did **not** predict academic achievement as well for black as for white students, a

conclusion that goes against the results of considerable research (Jensen, 1980; Reschly, 1996; Reynolds, 1990).

Based on these conclusions regarding IQ test bias, as well as the assertion that the named plaintiffs were not "really" retarded, Peckham then subjected the facts in the case to a legal analysis using statute (especially, the nondiscrimination principles in Section 504 and EHA) and constitutional law (especially equal protection from the 14th Amendment). Peckham concluded that the defendants had violated the nondiscrimination principle in federal law (34 CFR 300.530) as well as the equal protection principle in the U.S. Constitution. The latter finding was especially surprising in view of the change in equal protection case law from 1972 to 1979, a change which required proof of intent to discriminate (Bersoff & Hofer, 1990). Despite the difficulty of determining intent, Peckham cited several patterns of conduct by the state defendants that he concluded established intent to discriminate against black students, a conclusion that was particularly inappropriate in the view of a school psychologist who was an expert witness in the case (Lambert, 1981). Judge Peckham then forbade the use of IQ tests with black students if the outcome of such testing was a diagnosis of MMR and placement in special education. The CDE also was ordered to monitor disproportionate minority representation in what he described as "dead-end" special education classes: and to investigate districts with overrepresentation in special education.

PASE. *Parents in Action on Special Education v. Joseph P. Hannon (PASE)* (1980) was a class action suit on behalf of black students in the Chicago Public Schools and the State of Illinois alleging misclassification of students as mentally retarded due to biases in IQ tests. *PASE* was filed originally in 1977. A trial was held over a 3-week period in 1979 with a decision rendered in July, 1980. Judge Grady ruled in favor of defendants in a decision remarkably contradictory to the *Larry P.* opinion that had been announced less than one year earlier in a federal Court in another Circuit. The plaintiffs appealed the trial decision, but withdrew that appeal prior to the Circuit Court decision because the basic issue tried in the case, use of IQ tests with black students, became moot through action of the Chicago Public Schools Board of Education eliminating the use of IQ tests in the Chicago schools. Although *PASE* is an obvious contradiction of *Larry P.*, the fact that the issues in the case are now moot and the absence of an appeals court upholding the trial decision makes *PASE* largely irrelevant to contemporary legal issues regarding special education assessment, classification and placement.

In contrast to Judge Peckham, Judge Grady in *PASE* found IQ tests to be largely free of biases. The use of IQ tests with appropriate procedural

safeguards by properly trained persons, along with supplementary information on the student, was seen as overcoming the scant biases in popular IQ tests.

It is important to note the heavy emphasis on IQ tests in both cases. We can only speculate about the outcome of both cases if other aspects related to overrepresentation would have received more attention (e.g., prior education options and program quality). These latter issues became increasingly important in the 1980s trials on overrepresentation.

A great deal of prior analysis concerning *Larry P.* and *PASE* has appeared in the literature (Bersoff, 1982a, b, Elliott, 1987; Lambert, 1981; MacMillan & Meyers, 1980; Prasse & Reschly, 1986; Reschly, 1980, 1996; Reschly, Kicklighter, & McKee, 1988b, 1988c; Sattler, 1981). Both cases made poor use of evidence from psychological theory and research. Bersoff's scathing criticism of both judges is particularly instructive concerning the poor use of social science evidence.

Other critical features of *Larry P.* were the implicit assumptions and underlying issues (Reschly, 1979, 1981, & 1996), particularly Judge Peckham's denouncement of MMR programs as dead end, inferior, stigmatizing, and so on. Persons interested in further discussion of these issues are referred to previously cited sources. Finally, Sattler (1981) provided an excellent contrast of the judges' views in *PASE* and *Larry P.* over the following issues: (a) the function of MMR special classes, (b) the ways students were selected for MMR special classes, (c) the degree to which the IQ test is the most important information during selection, (d) what intelligence tests measure (e) the degree to which socioeconomic factors account for black-white differences in average IQ, (f) the degree to which nonstandard English affects the performance of black students, (g) the degree to which cultural differences between black and white students affect performance on IQ tests, and (h) whether specific items on intelligence tests are culturally biased.

***Marshall* and *S-1* opinions.** Two trials devoted to overrepresentation of black students in MMR special education programs in the Eleventh Circuit were decided in favor of defendants (*Marshall*, 1984; *S-1*, 1986). *Marshall*, the most important of these cases in terms of precedent value and possible influence on current special education practices, was a class action suit filed in June, 1982, by Georgia Legal Services, Inc., and the Georgia State Conference of Branches of NAACP. The plaintiff class, composed of all black students in the Georgia public schools, was certified in April, 1983. The plaintiffs alleged violation of various statutory and constitutional rights (equal protection), Title VI of the Civil Rights Act of 1964, the Equal Education Opportunities Act, and the nondiscrimination principle in Section

504 of the Rehabilitation Act of 1973. A trial was conducted by Judge B. Avant Edenfield in the United States District Court, Southern District of Georgia, Savannah Division from October 31 to December 20, 1983.

Plaintiffs alleged overrepresentation of black students in MMR programs was caused by: a) numerous violations of procedural regulations such as timely reevaluation and representation of appropriate persons in staffing decisions, IEP development, and IEP review; and (b) improper interpretation and application of federal and state requirements governing classification and placement of students in MMR programs (particularly IQ cutoff and adaptive behavior assessment). Two basic lines of evidence were provided by expert witnesses testifying on behalf of the Marshall plaintiffs: a) statistical analyses of the composition of special education programs in Georgia (especially MMR); and b) detailed review of **selected** records of students placed in MMR programs.

The plaintiffs' statistical analysis concluded that most Georgia school districts had statistically significant overrepresentation of black students in MMR programs and, in about half of the districts, underrepresentation of black students in SLD programs. This statistical analysis established the basis for a finding of disparate impact and shifting the burden to defendants to prove a rational relationship between their procedures and a legitimate state interest.

The second line of evidence provided by plaintiffs was based on a review of the special education records of 15 students in the defendant school districts. Multiple violations were identified in what were acknowledged as the worst cases from each of the school districts. The alleged violations included: a) several cases in which the global or full scale IQ was slightly above 70; b) failure to properly assess adaptive behavior and to exclude students from the MMR diagnosis if the adaptive behavior in any domain was within two standard deviations of the mean; c) some reevaluations were older than three years; d) no documentation of vision and hearing screening in some cases; e) there were several cases in which parents did not participate in the development of IEPs, although evidence of parental consent for evaluation and placement was present in all cases; (f) inadequate documentation such as missing signatures on forms reflecting representation in staffings; g) inadequate implementation of the least restrictive environment principle because most MMR students were in special classes rather than part-time resource programs; h) occasional improper selection of assessment instruments; i) achievement scores slightly higher than IQ scores in a few cases; and j) inadequate consideration of social and cultural background. Plaintiffs claimed these violations of procedural regulations and the misinterpretation or misapplication of the state IQ guidelines and adaptive behavior requirements caused massive

misclassification of black students as MMR.

An unintentional, unanticipated event occurred regarding plaintiffs' review of records. The records of three white students were part of the sample of 15 records selected by plaintiffs and reviewed by their expert. The same problems existed in the records of the white students, undermining the plaintiffs' racial interpretation of the problems identified in their review of records.

Although the *Marshall* defendants admitted errors in implementation of some regulations, they sharply disputed plaintiffs' allegations that these violations were related to race, resulted in misclassification of students, and reflected intent to discriminate. Defendants argued that their procedures and classification criteria reflected best professional practices and that the same procedures and criteria were applied equally to white and black students. The defendants' case was based on justifying the necessity and benefits of programs for students classified as MMR as well as rebutting plaintiffs' recommendations concerning classification criteria (Reschly et al., 1988b, 1988c). Defendants described MMR programs as designed for students with low mental ability who typically have experienced several years of very low achievement in general education prior to being referred, evaluated, classified as MMR, and placed in special education. The MMR curriculum was described as providing more concrete experiences with greater amounts of practice, more explicit instruction, and experiences designed to overcome difficulties with abstract thought and transfer of skills to practical situations.

Witnesses for the local districts and the GDE provided evidence indicating the substantially greater resources devoted to the education of students in special education, typically amounting to one and a half to two and a half times the average amount expended on the education of students in general education. In addition the defendants attempted to illustrate the phenomena of MMR through a videotape showing ten and 11-year old white and black MMR students and white and black general education students. The students were shown performing fairly common tasks including a brief sample of handwriting, reading a simple passage orally, performing an arithmetic calculation, and determining the time shown on several clocks. Although completely unrehearsed, the differences between students of the same age placed in general and special education programs were nothing short of dramatic. The performance of white and black general education students performing at the average level was indistinguishable, as was the performance of white and black MMR students. The videotape illustrated the defendant's fundamental contention that a genuine disability, not race, was the major difference between regular and special education

placement for black and white students.

Each of the defendant school districts and representatives of the GDE described policies concerning referral, evaluation, classification, and placement. These practices were tied to best practices described in the National Academy of Sciences Report on equity in special education classification and placement (Heller et al., 1982). Defendants emphasized the use of general education interventions **prior** to referral which, typically, occurred after several years of severe and chronic achievement problems in general education.

Defendants also attacked the plaintiffs' interpretation of the statistical evidence concerning overrepresentation (Reschly et al., 1988b, 1988c). Defendants rejected the assumption that the percent of black students meeting the MMR criteria should necessarily be proportionate to the number of black students in the total student population. Widely known findings were cited concerning overrepresentation of black students in Chapter I and other compensatory education programs in Georgia and throughout the U. S. This overrepresentation was seen as reflecting a higher incidence of learning problems among black students throughout the achievement ranges of low-average, slow learner, borderline, and MMR. The defendants also cited the National Academy Report (Heller, Holtzman, & Messick, 1982, p. 42), which indicated that mechanical application of a rigid IQ score in classification such as that recommended by plaintiffs might lead to considerably greater, rather than less, minority overrepresentation.

The defendants admitted violations of procedural regulations,

> the local defendants acknowledged that in certain instances they failed to properly document students' files and timely perform reevaluations in violation of the regulations. However, these infractions occurred because of staffing problems and permissible delays rather than any intentional attempts to misclassify students, black or white, for the special education program. (*Marshall*, 1984, p. 62)

The critical issue here, according to the court, was whether the procedural violations occurred more frequently with black than with white MMR students, whether the procedural violations led to massive misclassification of black students, and whether the procedural violations reflected intent to discriminate against black students.

Perhaps the most dramatic indication of the *Marshall* Court's judgment of plaintiffs' allegations appeared at the beginning of the analysis of the equal protection claim, "The court is somewhat perplexed by plaintiffs'

claims in this area. Perhaps the confusion is best explained by failure of proof on the part of the plaintiffs" (*Marshall*, 1984, p. 103).

Although the court was quite dissatisfied with plaintiffs' evidence, Judge Edenfield concluded, "Plaintiffs have demonstrated impact with regard to the overrepresentation of black students in MMR sufficient to require the defendants to make a showing of sufficient nondiscriminatory justification" (*Marshall*, 1984, p. 122-123). The court then reviewed the considerable evidence on the issues such as IQ guidelines, adaptive behavior assessment, and least restrictive placement. The court concluded that defendants met their burden of showing sufficient nondiscriminatory justification because: (a) the regulations developed by the GDE met or exceeded federal law and legislation in special education; (b) the practices advocated by the state were professionally sound, although there were differences among expert witnesses on best practices in several areas; and (c) local defendants have substantially complied with practices prescribed by the state and federal regulations.

Once the court decided that defendants had met their burden of showing sufficient nondiscriminatory justification for the practices that had a disparate impact, the burden then shifted back to plaintiffs who needed to show alternatives that were equally sound, but had less disparate impact. The court concluded that plaintiffs had not shown better alternatives because state and local regulations and practices conformed closely to AAMD recommendations, which the court saw as the preeminent authority in this area.

Repeatedly, Judge Edenfield indicated that evidence showing differential treatment of white and black students with achievement problems had to be provided to substantiate plaintiffs' claims. Judge Edenfield concluded that none of the students whose files were reviewed, ". . . constituted glaring examples of gross misclassification" (*Marshall*, 1984, p. 141). Moreover, the plaintiffs experts acknowledged that all of the students whose files were reviewed were either within or very close to the MMR range of functioning. Judge Edenfield then suggested that professional judgment had to be exercised as to whether students very close to cutoff points are properly classified as MMR. Judge Edenfield then expressed reluctance to substitute the professional judgments of experts who had no direct contact with the students for the judgment of local officials who knew both the students and the programs best.

The *Marshall* case is important, particularly as elaborated by the Appeals Court, concerning the kind of evidence required to substantiate allegations of discrimination. Clearly, overrepresentation was insufficient. Unequal treatment in decision-making appears to be the primary standard which, in the *Marshall* context, required comparisons of black and white

referred students who were classified and placed in MMR. Judge Edenfield dismissed all plaintiffs' claims concerning discrimination by race and improper classification.

The *Marshall* decision was appealed by plaintiffs to the U. S. Court of Appeals for the Eleventh Circuit in September, 1984. The Appeals Court decision, referenced as *Georgia State Conference of Branches of NAACP v. Georgia* (October 29, 1985) upheld all of the trial court findings concerning discrimination. The Appeals Court decision was even more explicit and harsher concerning the plaintiffs' approach to proving discrimination against black students due to overrepresentation in MMR programs. The Appeals Court questioned whether plaintiffs had even met their burden of establishing the **prima facie** case for discrimination. Specifically, the Appeals Court suggested statistical evidence on overrepresentation did not show that practices of local defendants, "Impacted more harshly on black children than on other students" (p. 36). "Practices which detrimentally affect all groups equally, do not have a discriminatory effect" (*Marshall*, 1984, p. 38). The Appeals Court clearly indicated that simple overrepresentation is not sufficient; evidence indicating differential treatment during referral, evaluation, classification, and placement had to be provided by plaintiffs in order to establish the groundwork for the allegation of discrimination.

S-1 v. Turlington. Another class action placement litigation trial dealing with overrepresentation of black students in MMR programs was conducted in May-June, 1986, in a federal District Court in Miami, Florida. The *S-1* plaintiffs, represented by attorneys from the Center for Education and Law in Cambridge, Massachusetts (who also represented the *Guadalupe* (1972) plaintiffs), alleged numerous violations of EHA principles (nondiscrimination, valid tests, least restrictive placement). The *S-1* plaintiffs, in contrast to *Marshall* plaintiffs, placed more emphasis on test bias and the interpretation of the sociocultural background portion of federal EHA Regulations. The *S-1* defendant, the Florida Department of Education (FDE), used some of the same strategies applied by *Marshall* defendants along with a strong emphasis on the benefits of MMR programs for students with low general intellectual functioning and severe learning problems. On October 9, 1986, Judge Atkins dismissed the claims of named plaintiffs "with prejudice" and decertified the class. Judge Atkins' ruling was quite unequivocal,

> Simply stated, plaintiffs failed to satisfy their burden of proof. They did not prove that any black student had been improperly classified and placed into the MMR program. Thus, it is clear that the action must be dismissed and the class decertified. (p. 5)

The dismissal with prejudice meant that the plaintiffs did not establish even a prima facie case of discrimination and that re-establishing a similar court suit on these issues in this district would be extremely difficult.

Larry P. (1986). After prevailing with the Ninth Circuit in 1984, the *Larry P.* plaintiffs sought an expanded injunction against the use of IQ tests because, in their view, school psychologists and special educators were subverting the 1979 trial opinion by using IQ tests as part of the evaluation of the eligibility of African-American students for other disabilities, especially SLD. The MMR classification and MMR programs had been abolished by the CDE as part of a special education master plan in the late 1970s. The *Larry P.* opinion injunction against IQ tests was narrowly drawn: IQ tests were banned, " ... for the identification of black E.M.R. children or their placement into E.M.R. classes, ... or a substantially equivalent category." By 1986 the CDE, the defendant in *Larry P.* in 1974 and 1979, joined the *Larry P.* plaintiffs to craft an agreement that was acceptable to both parties. The settlement agreement that was negotiated between the parties was approved by Peckham in an order that required the CDE to inform all school districts of:

> ... the complete prohibition against using IQ tests for identifying or placing black pupils in special education, ... an IQ test may not be given to a black pupil even with parental consent. Moreover, when a school district receives records containing test protocols from other agencies, ... IQ scores contained in the records shall not become a part of the pupil's current school record. There are no special education related purposes for which IQ tests shall be administered to black students. (*Larry P.*, 1986, p. 4)

The 1986 injunction appears to be a classic case of violation of equal protection for it meant that the CDE was ordered to establish different rules regarding the exercise of parental discretion and decision-making depending on the race of the child. If the child was black, one set of rules applied; however, a different set of rules were established if the child was white. It was an astonishing, even stunning turn of events in a case that had been, originally in 1972, decided on the basis of a school district's violation of the equal protection of the laws. How Judge Peckham was led into making what seems to be an obvious and egregious error is not apparent from the original injunction or the correction that soon was made in another suit that continued the *Larry P.* saga into the 1990s (*Crawford v. Honig*, 1988, 1992).

Crawford v. Honig, 1988, 1992. In May, 1988 *Crawford v. Honig* was filed in district court as a class action suit against the CDE on behalf of black students whose parents were prevented by the 1986 *Larry P.* injunction from making decisions about

IQ testing in preplacement evaluations of their children, a right exercised by parents of white children. *Crawford* plaintiffs cited the usual legal bases for their assertions of impermissible discrimination, including the U. S. Constitutional due process and equal protection rights, Title VI of the 1964 Civil Rights Act, and the nondiscrimination principle in EHA. The case was recognized immediately as directly relevant to the *Larry P.* issues and then remanded to Judge Peckham.

In 1992 Peckham rescinded the 1986 expanded injunction on due process grounds because the members of the Crawford plaintiff class, black children who may be diagnosed as SLD using IQ tests, were not represented in the original *Larry P.* plaintiff class or at the 1986 proceeding that produced the expanded injunction. As noted by Peckham in 1992, the language of the 1979 order in the trial opinion was, " ... clearly limited to the use of IQ tests in the assessment and placement of African-American students in dead-end programs such as MMR" (*Crawford v. Honig*, 1992 and *Larry P. v. Riles*, 1992, p. 15). Peckham then ordered the original *Larry P.* plaintiffs to report to the court within 14 days to discuss the feasibility of two alternatives: a) determining the contemporary meaning of the 1979 order, especially determining whether any current special education classifications and programs were "substantially equivalent" to the 1979 MMR programs; or b) a more extensive proceeding to examine evidence of the racial bias of IQ tests and their disparate effect upon the placement of African-American children, or members of other racial or ethnic minorities, referred for special educational services to determine whether a broad injunction similar to that achieved through stipulation in 1986 can be reinstated with the adequate factual support and sufficient representation by affected individuals to pass constitutional muster. (*Crawford*, 1992 and *Larry P.*, 1992, p. 23)

From the record, it appears that neither alternative has been pursued to date; instead, the *Larry P.* plaintiffs and the *Crawford* defendants joined in filing an appeal to the Ninth Circuit Court of Appeals seeking to overturn the 1992 order that rescinded the 1986 injunction. The appeal was denied, returning the status of the *Larry P.* litigation to the 1979 trial opinion and to the alternatives described in the preceding paragraph. Judge Peckham passed away recently, producing further doubt about the final resolution of the *Larry P.* matter.

The CDE has played a complex and changing role in the quarter century that the *Larry P.* matter has been before the federal courts. From the time of the original filing in 1971 through the Circuit Court of Appeals decision in 1984 the CDE was a principal defendant that vigorously

defended the use of IQ tests and the overrepresentation of African-American children in MMR. By 1986, however, the CDE **joined with** the *Larry P.* plaintiffs in crafting the strongly worded comprehensive ban on IQ tests that was rescinded in 1992. Since 1992, the CDE has disseminated strongly worded directives to school districts reminding them of the 1979 trial opinion, and interpreting that opinion as focusing primarily on the biases in IQ tests against African-American students. One of the CDE directives states the following conclusions.

1. The original *Larry P.* decision left no room for doubt that IQ tests are racially biased against African-Americans;

2. Any African-American child referred for assessment is at risk of misclassification as mentally retarded by an IQ test;

3. The risk of misclassification cannot be alleviated by parental consent;

4. Local educational agencies may not engage in a process whereby African-American children are tested, but the results disregarded if in the "MR" range;

5. Independent of the court's 1979 opinion, the CDE is obligated to prohibit the administration of IQ tests which have not been validated for the purpose of identifying African-American children as mentally retarded and which have been found to be racially and culturally biased by a United States District Court and the federal Court of Appeals; (California Department of Education, 1993, 1994).

In contrast to the 1994 CDE interpretations of the 1979 *Larry P.* trial opinion, Judge Peckham described that opinion in 1992 as:

1. " ... clearly limited to the use of IQ tests in the assessment and placement of African-American students in dead end programs such as MMR" (*Crawford* and *Larry P.*, 1992, p. 15).

2. "Despite the Defendants' attempts to characterize the court's 1979 order as a referendum on the discriminatory nature of IQ testing, this court's review of the decision reveals that the decision was largely concerned with the harm to African-American children resulting from improper placement in dead-end educational programs" (*Crawford* and *Larry P.*, 1992, p. 23).

Tests or Treatment on Trial?

Since 1979 there have been four trials in the federal district courts on issues related to overrepresentation of African-American children in special education programs. The judicial scoreboard is 3 to 1; defendant school districts and state departments of

education have prevailed in three of the trials. The only trial in which plaintiffs prevailed was *Larry P.* Two of the trial opinions were upheld when appealed to U.S. Circuit Courts of Appeal (*Larry P.*, 1984; *Marshall* (a.k.a., *Georgia State Conferences of NAACP*), 1985). The circuit court results are 1 to 1. The 9th Circuit affirmed the *Larry P.* trial opinion banning IQ tests for the narrow purpose of classifying black children as MMR; however, the 11th Circuit affirmed the *Marshall* trial court opinion that permitted African-American overrepresentation in special education MMR programs. Neither case was appealed to the U.S. Supreme Court; therefore, it is likely that these contradictory circuit court opinions will not be resolved by a higher court opinion. Unlike the legal concept of "appropriate education" that was defined by a Supreme Court opinion, the legal meaning of "nondiscrimination" is likely to remain elusive and ambiguous.

Although I, as well as others, have sometimes focused primarily on the IQ testing aspects of the litigation (e. g., Bersoff, 1982a 1982b; Elliott, 1987; Reschly, 1980), a better understanding is gained by focusing on the implicit issues in these cases that motivated the plaintiffs and the central role of treatment outcomes in shaping judicial opinions (Reschly et al., 1988c).

Implicit Issues

That more than IQ tests and overrepresentation were involved in plaintiffs' motives is apparent from a careful analysis of the four cases. For example, consider the *Larry P.* opinion that reflected plaintiffs' assertions that: 1) IQ tests were biased; 2) That IQ and achievement tests "autocorrelated," i.e., they were the same; and 3) "The customary uses of achievement tests are not questioned by plaintiff, even though black children also tend not to do well on these tests" (*Larry P.*, 1979, p. 952). That reasoning makes little sense unless factors other than IQ tests were of concern. Furthermore, as noted previously, economically disadvantaged, minority students are over-represented in a variety of educational programs including Head Start, Chapter 1, and Follow Through. This overrepresentation is well-known, but, apparently, acceptable. Implicit issues and assumptions provide an explanation for these seemingly inconsistent elements in plaintiffs' positions.

Nature-Nurture. The controversy over the relative effects of heredity and environment as influences on intellectual development is increased markedly when hereditarian views are extended to explain differences between racial groups (Herrnstein & Murray, 1994; Jensen, 1969). According to Elliott's exhaustive study of the *Larry P.*, the case was established by an advocacy group that wanted to change dramatically the use of tests in schools (Bay Area Association of Black Psychologists, 1971). The *Larry P.* court case was a means to refute the hereditarian explanations of racial differences in IQ.

The *Larry P.* trial opinion is often cited by black psychologists as proving that IQ tests were biased against black children (Dent, 1976, 1993; Hilliard, 1980, 1983, 1992; Jones, 1988; Jones & Jones, 1987; Jones & Wilderson, 1976). Although the case focused on practices in school psychology and special education, the defendants uppermost in the minds of the plaintiffs were Jensen (1969) and Shockley (1971), proponents of hereditarian explanations of race differences on IQ tests. It is likely that comparable efforts to attack standardized tests will appear in the aftermath of the recent publication of a popularized account similar to the Jensen and Shockley views (Herrnstein & Murray, 1994).

Meaning of IQ Test Results. A number of myths regarding the meaning of intelligence test results have been around for several decades. Of particular concern are the beliefs that IQ test results are predetermined by genetic factors, that intelligence is unitary and is measured directly by IQ tests, and that IQ test results are fixed. The evidence available for nearly three decades has clearly refuted these myths (e.g., Hunt, 1961) and the vast majority of professional psychologists do **not** harbor such misconceptions. A significant portion of the testimony in the *Larry P.* and *Hobson* litigation was devoted to disproving these myths. However, some judges apparently have been surprised that IQ tests do not measure innate potential, which, in turn, has contributed to judicial skepticism about the fairness and usefulness of such tests (Bersoff, 1982a, b).

Role of tests. In the nondiscrimination court cases plaintiffs implicitly assumed that IQ tests were the primary if not the sole basis for the classification of students as MMR (Mercer, 1973, 1979a, b; *Larry P.*, 1979). The role of standardized tests in the classification process was exaggerated. From reading this literature one might reach the totally erroneous conclusion that special education eligible and placed students were performing well until a psychologist came along and ensnared unsuspecting children in a pernicious psychometric net. The single most important determinant of classification is academic failure in the regular classroom leading to referral, a fact stressed by defendants in *Marshall* and *S-1*. It is only in this context that individual IQ tests are given and classification even considered.

Meaning of Mild Mental Retardation. The reasoning in the *Larry P.* decision was that the plaintiffs were not "truly retarded" despite low IQs, low academic achievement, and teacher referral. The effort to identify "true" mental retardation appears to be related to confusion of mild with the more severe levels of mental retardation. The criteria for "true" mental retardation are apparently believed to require comprehensive incompetence, permanence, and evidence of biological anomaly (Mercer, 1973; 1979a, b). In contrast, the American Association on Mental Retardation (AAMR) classification

system does not specify etiology or prognosis (Grossman, 1983; Luckasson, et al., 1992). In addition, different domains of adaptive behavior are emphasized depending on the age of the individual. There was little doubt that the students represented by plaintiffs in the placement litigation had serious academic problems. The question was whether they were "truly" retarded, or whether they merely performed within the retarded range due to biases in the IQ tests. Confusion over the meaning of MMR and questions concerning the criteria for adaptive behavior were key issues in all of the cases.

Effectiveness of MMR Special Classes. Although the research problem is extremely complex, precious little empirical support exists for the efficacy of MMR classes at the elementary and junior high school grade levels (Kavale, 1990). Any benefits that do exist appear to be in the areas of social and personal adjustment, not academic achievement. The doubts about special classes were accepted as fact by the *Larry P.* Court. Proper classification followed by poor treatment is quite justifiably viewed negatively. Recent trends toward more emphasis on regular education alternatives before referral and greater use of part-time special education placements as well as evidence that secondary level MMR programs are effective might alleviate some of the concerns that were prominent in the litigation.

Meaning of Bias. Many definitions of bias in tests have been proposed in the psychological and educational measurement literature (e.g., Reschly, 1982; Reynolds, 1990). Rather narrow and simplistic criteria have been used by plaintiffs. The definitions of bias used by the courts have been overrepresentation percentages, the rather simplistic notion of mean differences, and judgments of item bias. On the basis of these criteria, all current measures of achievement and ability would be regarded as biased. However, other criteria such as statistical analyses of item bias, predictive validity, and construct validity have been studied with minority samples using conventional tests. Current tests typically are not biased according to these latter criteria (Jensen, 1980; Reschly, 1982; Reynolds, 1990; Sandoval, 1979).

Exaggerations and Distortions of Overrepresentation Data. In the *Larry P.* trial opinion Judge Peckham reprinted CDE data indicating that black students constituted about 10% of the California student population, but 25% of the MMR population. These proportions apparently were stable over a number of years. The question is, What proportion of black students were in MMR classes?

Many professionals assume from the data just given that a high proportion of black students are in special education programs because they make the mistake of interpreting the percent of the MMR program by group as the

percent of the group in the MMR program. In fact, the proportion of California black students in the MMR program at the time of the *Larry P.* trial was only 1.2%, an astounding result in view of the heated rhetoric regarding the effects of ability tests on black students (see later discussion).

The national overrepresentation of black students in special education, when viewed as a comparison of the percents of black and white students in special education, is rather small. The usual presentation of the special education enrollment statistics focuses on the percents of programs by groups which has the effect of making the actual proportion of black students in special education appear much larger that it actually is. In fact, the actual proportion of back students in special education is a relatively small proportion of the overall population of black students and only slightly larger than the proportion of white students in special education (see next section).

Comparisons of Larry P., Marshall, and S-1

A number of significant differences between *Larry P.*, *Marshall*, and *S-1* were discussed in Reschly et al., (1988c), particularly regarding how basic issues were framed by the defendants. The fundamental differences were as follows: 1) The role of IQ tests, seen as primary in *Larry P.* were viewed as secondary to severe, chronic achievement problems in *Marshall* and *S-1*; 2) Implementation of prior educational alternatives before referral for possible consideration of special education placement were stressed in *Marshall* and *S-1*, including placement in other remedial or compensatory education programs, other tutorial services, and grade repetition; 3) Greater emphasis on adaptive behavior in *Marshall* and *S-1*, particularly on a conception of adaptive behavior that included practical cognitive skills; 4) Careful presentation of overrepresentation statistics in *Marshall* and *S-1* such that the court understood clearly the differences between percent of group in program vs. percent of program by group (see prior section); 5) Compilation of data in *Marshall* and *S-1* showing African-American students were much more likely to be placed in other remedial or compensatory education programs rather than MMR special education programs (e.g., Head Start, Chapter 1, and LD resource, all of which were used much more frequently than MMR special education placement); 6) Conformance to the AAMR classification scheme; 7) Provision of an explanation for overrepresentation, specifically the effects of poverty as opposed to the "agnostic" position on this issue taken by the California *Larry P.* defendants; and 7) Emphasis on the results of the National Academy of Science Panel's analysis (Heller, et al., 1982) that acknowledged overrepresentation as acceptable if appropriate instruction, among other things, was provided.

How issues are framed in a case depends on the strategies developed by plaintiffs and defendants (See Table 2). Both sides in the *Larry P.* case focused primary attention on the IQ tests, and the defendants did not spend a great deal of effort establishing the benefits of the MMR program. Judge Peckham regarded the MMR programs as dead-end, conferring few if any benefits, and causing much harm such as stigma and limited academic opportunities. Given the assumptions about the treatment, it is not at all surprising that the court agreed to the solutions proposed by the *Larry P.* plaintiffs who were, for other reasons, interested primarily in a refutation of the validity of IQ tests for black students. Although Judge Peckham claimed in 1992 that *Larry P.* was not a referendum on IQ, the leadership of the Bay Area Association of Black Psychologists clearly thought otherwise, a view that has not changed to date (Dent, 1993; Hilliard, 1992; Jones, 1988). The California defendants, because they did not and, perhaps, could not defend the benefits of the MMR programs, choosing instead to focus on IQ tests, unwittingly cooperated with plaintiffs in making *Larry P.* a referendum on IQ. That referendum was limited, however, by Peckham's narrow ban that applied only to MMR, a category that the CDE abolished at about the time of the *Larry P.* trial. Efforts to date to expand the IQ ban to other states or, in California, to other disabilities have been unsuccessful. As noted in Reschly et al. (1988c), as well as by Lerner (1988), the most defensible *Larry P.* outcome, legally and scientifically, would have been a ban on dead-end special education programs for which benefits were undocumented. In retrospect, it is clear that program benefits were the chief issues in the special and general education placement and tracking litigation. In *Larry P.* and *Hobson* program benefits were non-existent according to Judges Wright and Peckham. In contrast, Judges Edenfield in *Marshall* and (apparently) Judge Atkins in *S-1* saw program benefits as sufficient to permit disparate placement outcomes. Treatment efficacy, therefore, appears to be the central issue in disproportionate placement litigation, in the past and, likely, in the future.

Table 2. Differences in Treatment of Issues in Larry P., Marshall, and S-1

Issues	Larry P.	Marshall and S-1
Role of IQ Tests	Primary and Pervasive	Secondary to Chronic Low Achievement
General Education	Ignored by Court Not Emphasized In Defendants Case	Multiple General Education Interventions Prior to Referral Documented by Defedants
Adaptive Behavior	Out of School Setting with No Emphasis On Practical CognitiveSkills	Multiple Contexts Including theSchool Setting and Practical Cognitive Skills
Overrepresentation	Not Understood by Court; Not Clarified by Defendants	Understood by Court; Clarified by Defendants
Overrepresentation In Other Program	Not Addressed by Defendants	Documented and Stressed by Defendants
Use of Authoritative Sources	Not Emphasized	Emphasized In All Aspects of Defense, Especially Grossman (1983) and Heller et al., 1982
Explanation for Over-Representation	"Agnostic" No Explanation	Focused on Effects of Poverty, Emphasizing Overrepresentation of Economically Disadvantaged Students inSpecial Education Regardless of Race or Ethnicity

A summary of the key issues in the special education litigation follows. States and districts have less to fear in such litigation to the extent that they can provide programs and frame issues as they were framed in the *Marshall* and *S-1* cases. If the programs are like, or understood by the court as similar to, those depicted in *Larry P.*, then, it is impossible for a state or district to prevail. Moreover, if the programs are dead-end and inferior, and minority students are overrepresented in such programs, districts or states **should** lose. If the programs are like those defended in the Georgia and Florida cases and the issues framed as they were in those cases, it is highly likely that districts and states can prevail in overrepresentation litigation. The absolutely critical feature of program quality as an influence on the outcomes of overrepresentation litigation cannot be emphasized too much. Overrepresentation of minority students in good programs is defensible. Overrepresentation of minority students in poor programs can never be defended. And that is the real significance of the special education litigation.

Implications of Legal Requirements and Case Law

1. Nondiscrimination as a principle is firmly established at several layers of legal requirements, including, federal statute, federal regulations, state statute, state rules, and case law.
2. Nondiscrimination, has not been defined in case law, nor through criteria in federal or

state compliance monitoring. Two **implicit** conceptions are apparent in case law and compliance monitoring: equal treatment and equal results (see later section).

3. Case law precedents exist for both conceptions of nondiscrimination. Three federal court cases were decided using an equal treatment conception of nondiscrimination. One case was decided using an equal results conception of nondiscrimination.
4. No cases involving the nondiscrimination principle and overrepresentation of minority children and youth in special education have been decided in the Eighth Circuit (the circuit that includes the State of Iowa).
5. The minimum requirement for nondiscrimination, based on a wide variety of evidence, is equal treatment. The essence of equal treatment is comparable decisions, processes, and outcomes for persons who have similar characteristics.
6. Failure to meet the equal treatment conception of nondiscrimination places a publicly-supported educational agency at great risk in compliance monitoring and litigation. Unequal treatment of minority students, especially if the unequal treatment results in services that are poorer in quality, virtually guarantees that the educational agency involved will lose a court challenge or a compliance review.
7. Case law on nondiscrimination involving disproportionate minority representation appears to have been markedly influenced by the nature of the procedures to assign students to different programs **and the quality of the programs**. Disproportionate minority representation in programs with fewer resources or limited opportunities has been forbidden in federal court opinions. In contrast, disproportionate minority representation has been permitted in programs that had more resources than other alternatives and outcomes reflecting expanded skills and opportunities.
8. The physical location of the program and the amount of interaction with general education students and curricula also have influenced federal court decisions in nondiscrimination cases. Generally, greater involvement with general education and flexible assignments of students to instructional groups are

viewed favorably by the federal courts.

9. Disproportionate minority representation in self-contained special education classes using a markedly different curriculum, because of the association with impermissible segregation of students by race, is less likely to be permitted by the federal courts.
10. The basis for classification and placement decisions in agencies with disproportionate minority representation also influences the outcomes of federal court cases alleging nondiscrimination due to disproportionate minority representation in special education. Classification and placement practices that rely primarily on, or appear to rely primarily on, tests such as IQ measures are much less likely to be permitted in federal court cases. Classification and placement decisions based on a broad variety of information, including documentation of multiple attempts to resolve problems in general education, are more acceptable to the federal courts and to compliance monitoring agencies.

PART III: Understanding and Using Disproportionate Enrollment Statistics

Information on the scope and nature of the disproportionate minority representation in special education is difficult to obtain and, once it is available, even more difficult to interpret accurately. One of the most difficult and least appreciated complications in discussions of disproportionate minority representation in special education involves enrollment statistics presented as percentages. Problems exist with the seemingly simple and straightforward percentages such as those favored by the OCR in their investigations of districts and states. It is essential to know **what** any percentage actually represents. Most persons do not distinguish between the ***percent of program by group*** and the ***percent of group in program***. A distinction between different percentages is crucial to understanding disproportionate minority representation in special education. Consider the following statements:

> The report indicates that, while the student population in general was 70% white, 12% African-American, and 13% Latino, the population of exceptional individuals served during the 1987 school year was 65% white, 24% African-American, and 8% Latino. (Artiles & Trent, 1994, p. 413)

That is, the larger the minority student population in the school district, the greater the representation of minority students in special education classes. (Artiles & Trent, 1994, p. 414)

The 226,854 blacks reported in EMR classes in 1978 represent 38.01% of the EMR school-age population, which is the percentage reported in Table 1. At the same time blacks constituted 15.72% of the total school enrollment, which is also shown in Table 1. (Chinn & Hughes, 1987, p. 42)

The racial distribution of youth with disabilities differs from that of youth in the general population. Table 1.5 indicates, that for all disabilities combined, 65% are white, 24% are black, and 8% are Hispanic. In contrast, youth in general (i.e., sophomore cohort of a 1987 Center for Educational Statistics sponsored study) are 70% white, 12% black, and 13% Hispanic. (U.S. Department of Education, 1992, p. 15)

An illustration of the differences in these percentages may sharpen the importance of the distinction. First, consider the actual enrollment statistics in California when the *Larry P.* trial began in 1977. Black students constituted 10% of the California school enrollment, but 25% of the enrollment in MMR special education programs. The total California enrollment was 4,380,000. There were 19,289 students in MMR special education programs. Simple arithmetic yields the following conclusions:

> .10(4,380,000)=438,000 the total number of black students
>
> .25(19289)=4882.25, rounded to 4882 is the number of black students in the MMR program
>
> 4882/438,000=1.1%, the percentage of black students in the MMR program

The crucial distinction is between the percent of program by group which, was 25% in the computational example above, versus the percent of group in the program which was 1.1%. In fact, as noted earlier, just over 1% of black students in California were affected by the *Larry P.* (1979) ban on IQ tests. Both kinds of percentages are accurate indices that are useful in examining disproportionate minority representation in special education. The problem arises when the two kinds of percentages are confused or used interchangeably. Moreover, using the percent of program by group often leads to misunderstanding the actual rate of overrepresentation and the proportion of students affected by over-disproportionate minority representation.

The distortions come about because the base rate for some characteristic or phenomenon is different than the proportions of persons with some other characteristic in the general population. The base rate is the rate of occurrence of some phenomenon in the general population. For example, the base rate for the female gender is slightly more than 50% in the adult population. The base rate for elementary level teachers as a career in the general population is low; for this example, assume that it is 3%. That is, 3% of all adults in the general population are in the career of teaching. Now what percent of elementary teachers are women?

The percent of elementary teachers who are women is very high, say 85% Thus, it might be said that the composition of the elementary teaching field is 85% women. Does this mean that a high percentage of women are teachers? Our informal observations are sufficient to conclude that only a small percentage of women are teachers. In this example, even though the percent of group by gender is very high, the percent of gender in the group is very low. The **same** relationship exists with disproportionate minority representation in special education. Although black students are over-represented in MMR, just as women

are over-represented in elementary teaching, only a small percentage of black students are in MMR, just as only a small percentage of women are elementary teachers.

The actual national overrepresentation of black students in special education programs often is exaggerated by presenting the percent of program statistics and implying that a large proportion of black children are in special education programs (e. g., Chinn & Hughes, 1987; Harry, 1994). Percent of group in special education statistics, that is, the actual proportion of black children in special education, reveals a significantly different perspective: the proportion of black children in special education is relatively small and only slightly larger than the proportions for white students. It also is important to note that Hispanic students are not over-represented in special education programs according to the OCR data.

Which is it?
Percent of category or program by group? Or
Percent of group in category or program?

1. Most news anchors on television are men despite rather impressive increases in the number of women appointed to these roles in recent years. A recent study indicated that of the 28 anchors on nationally televised news 18 were men. Now compute the following;

   a. What is the percent of news anchors that are male? (i. e. the percent of the category or program by group)

   b. What percent of the approximately 90 million adult males in the U.S. population are national news anchors? (i. e., the percent of the group in the category or program)

1. A casual perusal of the Iowa State University staff listings in the Department of Electrical Engineering revealed that six of 47 professors had Asian-American surnames. The overall population of 2.85 million in the State of Iowa is about 1.5% Asian-American. Are Asian-Americans over-represented on the electrical engineering faculty? What proportion of Asian-Americans in Iowa are on the electrical engineering faculty at ISU?

   c. First find the percent of the electrical engineering faculty that is Asian American. This number is the percent of the category that is Asian-American.

   d. Now compute the percent of Asian-Americans in Iowa who are electrical engineers at ISU. This is the percent of group in the category.

Is there overrepresentation in these situations? How much overrepresentation? Does the apparent answer seem to vary by which percentage is used?

Answer Key:

1a. Divide 18 by 28=64%; which is the percent of category (national news anchors) by group (males).

1b. Divide 18 by 90,000,000=.0000002, which is the percent of group (males) in the category (national news anchors)

1c. Divide 6 by 47=13%, which is the percent of the category (ISU electrical engineers) by group (Asian-Americans)

1d. Multiply 2,850,000 by 1.5%=42,750, the number of Asian-Americans in the Iowa population. Then, divide 6 by 42,750=.0001, which is the percent of Asian-Americans in Iowa who are electrical engineers at ISU.

Disproportionate Representation Statistics in the Literature

One of the most widely cited analyses of disproportionate minority representation in special education was published by Chinn & Hughes (1987) using the OCR data for the 1978, 1980, 1982, and 1984 surveys of districts. A table from that article is reproduced verbatim as Table 3 on the following page. Perhaps the most misleading feature of the Chinn and Hughes table is the title: "Percentage of Blacks Enrolled in Each Category of Exceptionality". Examination of the data in the table soon reveals that the numbers there cannot be, in fact, the percentage of black students in categories of exceptionality. This becomes abundantly apparent from adding the numbers in the first column which, from the title, we would expect to be the percent of black students in 1978 who were classified as exceptional. The sum of the numbers in the first column is 129.66, clearly an impossible result if, in fact, the numbers in the table represent the percentage of black students in the various categories of exceptionality.

Table 3. Percentage of Blacks Enrolled in Each Category of Exceptionality (Chinn & Hughes, 1987, p. 43)

Category	1978	1980	1982	1984
EMR	38.01	45.30	54.01	48.30
TMR	27.16	30.57	37.08	33.18
SED	24.36	28.56	32.35	30.82
LD	15.08	19.81	27.25	25.55
SI	14.75	18.90	25.50	23.65
G/T	10.30	11.10	11.00	12.92
Percent of Black Students in Overall Enroll.	15.72	20.07	25.81	24.52

Notes: EMR= educable mentally retarded; TMR= trainable mentally retarded; SED= seriously emotionally disturbed; LD= learning disabled; SI= speech impaired; G/T= gifted and talented

The numbers in the Hughes and Chinn (1987) table are actually the percent of each of the categories of exceptionality by race, not the percent of race in each category. The Hughes and Chinn (1987) mislabeling is arguably an extreme example. In most cases the presentations of enrollment percentages do not so blatantly exaggerate the actual over- or under-representation. A more typical example comes from Harry (1994) in a background paper for the NASDE-OSEP forum on disproportionate minority representation in special education. Harry's Table 2 is reproduced as Table 4 of this paper. The title Harry (1994) used is only slightly less misleading than the title used by Chinn and Hughes (1987). Again there is the implication that a large proportion of minority students are in special education programs.

Another way to present the enrollment statistics is as the percent of each group in the category of exceptionality or special education program. Table 5 on page 55 is based on the same OCR survey data used by Chinn and Hughes (1987) and Harry (1994). The percentages are much lower and, on their face, suggest a problem of less severity. There is, undeniably, overrepresentation of African-American students regardless of how the percentages are presented and understood, but the **perception** of the problem differs depending on which statistic is used.

Table 4. Percentage of Students in Disability Categories by Race, 1986 and 1990 (Reproduced from Harry, 1994, p. 14).

	NA		ASIAN		HISPANIC		BLACK		WHITE	
	86	90	86	90	86	90	86	90	86	90
Total Enrollment In School System	1	1	3	3	10	12	16	16	70	68
Gifted & Talented	0	1	5	6	5	6	8	8	81	79
Educable MR	1	1	1	1	5	8	35	35	58	56
Trainable MR	1	1	2	2	10	20	27	32	60	46
Speech Impaired	1	1	2	2	8	9	16	16	73	73
Severely ED	1	1	1	1	7	6	27	22	65	71
Specific LD	1	1	1	1	10	11	17	17	71	70

In some analyses of the OCR survey data, percent of group in program statistics are reported. In Table 5, data from OCR surveys in 1978, 1986 and 1990 are reported as percent of group in different special education programs. Several trends are apparent in the data in Table 5. First, there is a gradual increase for all groups over the years represented in these surveys, with the largest increase between 1978 and 1986. Second, the percentages of Hispanic children and youth in these categories is lower than the percentages for black and white children and youth, a consistent finding over the three reporting periods. The difference between the white and black rates have gradually diminished over the 1978 to 1990 period. In 1978 the black-white difference was 2.51%. In 1986 the difference was 2.04%. By 1990, the black-white difference was reduced to 1.47%. Finally, MMR continues to be the category most responsible for the black-white differences in special education representation, accounting for about 88% of the differences between the two groups. Differences between black and white rates of SED are much smaller than the MMR differences and, in addition, involve a much lower percentage of students. In 1990, the black-white SLD prevalence differed by only .0002, a trivial difference.

Table 5. Proportions of Black, Hispanic, and White Students Classified as Mildly Disabled

	1978 OCR[a]			1986 OCR[b]			1990 OCR[c]		
	Black	Latino	White	Black	Latino	White	Black	Latino	White
Category									
MMR	3.46	0.98	1.07	2.30	0.56	0.87	2.10	0.65	0.81
SLD	2.23	2.58	2.32	4.43	4.31	4.29	4.95	4.68	4.97
SED	0.50	0.29	0.29	1.04	0.46	0.57	0.89	0.33	0.69
Total (MMR+ SLD= SED	6.19	3.85	3.68	7.77	5.33	5.73	7.94	5.66	6.47

a. Based on Finn (1982, pp. 324-330).
b. Analyses by Reschly & Wilson (1990), using 1986 OCR survey data compiled by the National Council of Advocates for Students.
c. U. S. Department of Education (1994, pp. 198, 201, and 202).

MMR= Mild Mental Retardation; SLD= Specific Learning Disability; and SED= Seriously Emotionally Disturbed.

It is important to note some of the difficulties in the OCR surveys of districts. First, the OCR surveys have not been a representative sample of school districts in the U.S. OCR surveys involve the 50 largest school districts in the U.S. and a sample of other districts. The OCR sampling approach and the demographics of the largest school districts ensure that the OCR sample includes a larger percentage of African-American students than are in the general population. Second, OCR has not selected districts in the same way over the different surveys. This makes direct comparisons of the results of the different surveys tentative at best. The proportions of African-American students in districts surveyed by the OCR surveys have varied markedly over the years: 1978= 15.7%, 1980= 20.1%, 1982= 25.8%, 1984= 24.5%, 1986= 16%, 1990= 16%. The effects of the varying sampling procedures and the apparent over-sampling of African-American students are unknown and impossible to determine from the statistics reported by OCR.

A further problem with the OCR surveys is that they do not include all disabilities. Of the 13 disabilities recognized now in the IDEA statute, only four are included in the OCR

surveys: MR, SED, SLD, Speech Impaired (SI). In the OCR surveys, the OSEP category of MR is divided into two categories: MMR and Trainable Mentally Retarded (TMR). The deletion of nine of the OSEP categories of disability is not as large a problem as it might first appear. The prevalence of disabilities in those nine categories is extremely low as shown in Table 6. The prevalence of the other nine disabilities (autism, deaf-blindness, deafness, hearing impairment, multiple disabilities, orthopedic impairment, other health impairment, traumatic brain injury and visual impairment) is less than one percent of the student population. For these reasons, OCR's focus on four of the 13 disabilities recognized in the federal IDEA does not have much effect on the overall patterns of disproportionate minority representation in educational programs for students with disabilities.

Table 6. School Population Age 6 to 17 Diagnosed as Disabled

Category[a]	6-11	12-17	Total	Per Cent of Overall Pop.	State Variations
SLD	1,018,361 (41.42%)	1,298,523 (62.58%)	2,316,884 (51.10%)	5.27%	2.91% to 9.23% (GA) (MA)
Sp/L	893,769 (36.35%)	109,421 (5.27%)	1,003,190 (22.13%)	2.28%	1.16% to 3.88% (HI) (NJ)
MR	220,400 (8.96%)	268,273 (12.93%)	488,673 (10.78%)	1.11%	0.30% to 3.14% (NJ) (AL)
SED	140,675 (5.72%)	250,389 (12.07%)	391,064 (8.63%)	0.89%	0.05% to 2.05% (MS) (CT)
Other[b]	185,697 (7.55%)	148,381 (7.15%)	334,078 (7.37%)	0.76%	
Total	2,458,902 (100%)	2,074,987 (100%)	4,533,889 (100%)	10.31%	6.86%to14.90% (HI) (MA)

The data in this table were reported by states to the Office of Special Education Programs, a unit of the U. S. Department of Education. The statistics in the table were compiled from the *Seventeenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*,Tables AA5, AA6, and AA15 for the 50 states and the District of Columbia, U. S. Department of Education (1995). The percentages are based on a total estimated enrollment of children age 6-17 of 43, 975, 645.

a. SLD = Specific Learning Disability; Sp/L = Speech and Language; MR = Mental Retardation; and SED = Seriously Emotionally Disturbed.

b. "Other" is the prevalence of autism, deaf-blindness, deafness, hearing impairment, multiple disabilities, orthopedic impairment, other health impairment, traumatic brain injury and visual impairment.

Moreover, OCR believes that the disproportionate minority representation is greatest in the "judgmental" categories of MR, SED, SLD, and SI. Judgmental categories are those in which subjective judgments may influence diagnostic decisions because the disabilities involved do not have a clear biological basis. Although some professionals might quibble with OCR's view of TMR as not having an identifiable biological basis, the disabilities of MMR, SLD, SED, and SI typically do not have an identifiable biological basis and, in addition, these categories typically are not diagnosed until the child enters school. The less judgmental forms of disability that have an identifiable biological basis typically are diagnosed prior to school entry by medical personnel. Finally, the more judgmental disabilities usually are mild in degree and diagnosed after school entrance through teacher referral and multidisciplinary team evaluation.

In Table 7 data are presented from a national report regarding the prevalence of the five disabilities included in the OCR surveys for Native American Indian, Asian, White, Hispanic, and Black students (U. S. Department of Education, 1994). These results indicate that the black disabled student prevalence is about 1.73% higher than the white disabled student prevalence. Two groups in our student population are significantly under-represented in special education (Asian and Hispanic). The extremely low rate of Asian-Pacific Islanders is especially noteworthy, but unexplained in the literature to date.

Table 7. Percentage of Students Receiving Special Education, by Racial/Ethnic Group (Reproduced from U.S. Department of Education, 1994, p. 201).

Racial/Ethnic Group	Percent
Native American Indian	10.76%
Asian/Pacific Islander	3.65%
White	9.53%
Hispanic	8.24%
Black	11.26%

This table includes only students with MMR, TMR, SI, SED, and SLD. These results are based on the 1990 OCR survey of U.S. school districts.

The conventional wisdom for many years has been that minority students, especially African-American students, are over-represented in the judgmental categories such as MMR or SED, but not in the more biologically-based categories such as visual impairments, multiple disabilities, and orthopedic impairments. This conventional wisdom has been challenged recently with the publication of various reports from the National Longitudinal Transition Study (NLTS) (Wagner, 1995). Contrary to the conventional wisdom, African-American students were over-represented in all of the categories included in that study (U.S. Department of Education, 1992, p. 16).

Although black students constituted 12% of the sample, 24% of the students with disabilities were reported as black. Black students constituted the following proportions of the different categories: 21.6% of SLD, 28.0% of SI, 31.0% of MR, 25.1% of SED, 19.1% of Multiple Disabilities, 21.8% of Hearing Impairments, 19.0% of Orthopedic Impairments, 20.3% of Other Health Impairments, 25.9% of Visual Impairments, and 25% of Deaf-Blindness. Overall, although black students constituted 12% of he NLTS sample, they were 24% of the students with disabilities.

Readers are cautioned to note that the percentages presented in the preceding paragraph are **percent of category by group**. Unfortunately, the NLTS data were not reported as percentages of groups in the various categories. Had they been reported in that fashion, it would have been clear that only very low proportions of students have disabilities such as visual impairments, and the actual number of black students with the biologically-based disabilities in the NLTS sample would have been very small. These results do produce some skepticism regarding the conventional wisdom about judgmental vs. biologically-based disabilities.

As one final demonstration of the differences between the enrollment statistics of percent of program by group vs. the percent of group in program, both sets of data are presented side-by-side for the 1990 OCR survey in Table 8.

Table 8. Comparison of Percent of Group in Program and Percent of Program by Group: 1990 OCR Survey

	BLACK		HISPANIC		WHITE	
	Percent of Group in Program	Percent of Program By Group	Percent of Group In Program	Percent of Program By Group	Percent of Group In Program	Percent of Program By Group
MMR	2.10%	34.64%	0.65%	7.60%	0.81%	55.82%
SLD	4.95%	16.61%	4.68%	11.19%	4.97%	69.83%
SED	0.89%	21.47%	0.33%	5.81%	0.69%	70.65%
Chapter I	22.5%		31.3%		7.7%	
Percent of Total Population	16.20		11.54%		67.88%	

Disproportionate minority representation in educational programs is not restricted to special education. An examination of minority enrollment in programs such as Chapter I (a federally-funded compensatory educational program intended to provide assistance to economically disadvantaged students who are achieving below age and grade expectations) reveals significant overrepresentation of African-American and Hispanic students. According to Westat Inc., in 1988-1989 the per cent of African-American students in Chapter I was 22.5%; for Hispanic-Americans it was 31.3%; and for White Americans it was 7.7%. Although the disproportionality in Chapter I is worse than in special education, involving far more children, OCR does not cite districts for the overrepresentation of minority students in Chapter I and no district or state has been brought to the federal courts to answer legal challenges alleging discriminatory practices due to disproportionate minority representation in Chapter I. This introduces a dilemma that is captured in the questions that appear in the shaded box that follows.

THE DILEMMA OF SPECIAL EDUCATION DISPROPORTIONATE MINORITY REPRESENTATION

Consider these characteristics of an educational program:

1. **Lower student to teacher ratio (usually less than half the general education student to teacher ratio)**
2. **Significantly increased expenditures per student (twice to four times the general education expenditures)**
3. **Individualized program with general goals and specific objectives based on individualized assessment of educational needs**
4. **Teacher with specialized training**

ARE THESE DESIRABLE CHARACTERISTICS

Given the desirable characteristics of special education programs, why have states and districts been sued and enjoined by the courts due to disproportionate minority representation in special education?

Is the problem overrepresentation?

If overrepresentation per se is the problem, why is overrepresentation in Chapter I acceptable?

WHAT ARE THE IMPLICIT ASSUMPTIONS ABOUT SPECIAL EDUCATION??

Clearly, overrepresentation in special education is viewed differently than overrepresentation in other programs such as Chapter I, Head Start, and Follow Through, compensatory education programs focused on improving the educational achievement of economically disadvantaged students. The implicit assumptions are that the compensatory education programs are effective and, in sharp contrast, the special education programs are seen as ineffective, stigmatizing, and educationally inferior. Addressing the acceptability of special education programs, including ensuring their effectiveness with economically disadvantaged students, is one of the key components in resolving the issues associated with disproportionate minority representation in special education.

Economic Disadvantage as the Cause of Disproportionate Minority Representation

Before concluding this section, the causes of disproportionate minority representation in special education will be discussed briefly. A more complete treatment of this issue is long overdue,

but, in most instances, we do not have socioeconomic status (SES) information **recorded with** special education classification and placement information in existing data sets. In the instances of both kinds of information being available, students with disabilities typically have significantly lower SES than the general student population.

In one as yet unpublished study, SES as measured by eligibility for free or reduced cost lunch, was cross-tabulated with special education classification and placement. The prevalence of disabilities for black and white students varied significantly as a function of SES status. First in Table 9, the relative proportions of black, white, and "other" students in poverty circumstances are provided. Poverty rates for black students were about four times the white rate. Black students also were over-represented significantly in special education at a rate that was about twice what would be expected from their population proportions. The overrepresentation in Chapter I was slightly greater than the special education overrepresentation and, characteristically, the plaintiffs in the litigation did not challenge the fairness of Chapter I overrepresentation.

Table 9. Average Percentages of Students in Various Programs Across Four Delaware Districts in the *Coalition et al.* Litigation

	Percent of Group In Program			Percent of Program By Group		
Program	Black	White	Other	Black	White	Other
Subsidized Lunch	62%	15%	47%	61%	29%	10%
Chapter I	20%	9%	17%	49%	42%	9%
Special Education	16%	8%	9%	47%	47%	6%

Notes: Overall School Population: Black= 31%; White= 65%; Other= 4%

The added risk of poverty status is illustrated in the findings reported in Table 10. Substantial special education representation differences between those eligible for, and not eligible for, subsidized school lunches are apparent in these results. **Both** black and white students are much more likely to be in special education if they come from poverty circumstances. Moreover, the special education rates for black and white students were nearly equalized when poverty status was equated. Although speculative, it is

reasonable to suggest that a more accurate and sensitive measure of SES would equalize the special education rates for black and white students. Poverty clearly increases the risks of special education representation, a finding that held true in a sample of white students with SLD in central Iowa communities with relatively low rates of poverty (Reschly, Gresham & Graham-Clay, 1984).

Table 10. Special Education Eligibility by Poverty Status in Four Delaware Districts in the *Coalition et al.* Litigation

	District I		District II		District III		District IV	
	Black	White	Black	White	Black	White	Black	White
Eligible for Subsidized Lunch	24%	18%	19%	18%	19%	20%	19%	19%
Not Eligible for Subsidized Lunch	7.3%	5.3%	8.9%	7.3%	8.8%	7.3%	9.2%	5.3%

Practical Implications

A number of practical implications can be derived from the discussion of the different ways to present enrollment statistics and the association of poverty with increased special education representation.

1. It is critical to distinguish between **percent of program by group and percent of group in program**. Both should be used to assess disproportionate minority representation in special education.
2. Both percentages should be computed for the following variables:
   - Overall numbers in the student population by racial/ethnic groups
   - Percentages in the overall student population by each racial/ethnic group
   - Percentage of total special education program by racial/ethnic group
   - Percentage of each racial/ethnic groups in the total special education program
   - Percentage of each special education category by racial/ethnic group
   - Percentage of each racial/ethnic group in each special education category
   - Percentage of each special education program option by each racial/ethnic group
   - Percentage of each racial/ethnic group in each special education program
   - Percentage of each compensatory education by each racial/ethnic group

- Percentage of each racial/ethnic group in each compensatory education program
- Percentages of poverty status by racial/ethnic group
- Percentage of each racial/ethnic group in poverty status

Based on the results of the analysis of the enrollment statistics, further studies may be necessary. Further study is indicated if "significant" disproportionate minority representation in special education is identified. At this point, the attention should turn to criteria to judge disproportionate minority representation in special education and to determinations of the degree to which an equal treatment conception of nondiscrimination is met by the agency.

Computational Example

The following computational example applies data from the 1990 OCR survey of districts as summarized by Harry (1994) (See Table 4 in this paper) and the national prevalence of the four disabilities included in the OCR survey as reported in the 17th Annual Report to Congress (U.S. Department of Education, 1995) and summarized in Table 6 of this report. A hypothetical school district of 10,000 students is used in this example. The ethnic composition of the overall student enrollment in the district matches the proportions in the 1990 OCR survey, that is, Asian-Pacific Islander and Native American Indian= 4%; Black= 16%; Hispanic= 12%; and white= 68%. The national prevalence figures for the four categories of disability used in the OCR surveys of districts are given in Column A based on the 1995 OSEP annual report to Congress (U.S. Department of Education, 1995). The prevalence for EMR and TMR had to be estimated because OSEP combines all levels of MR into a single prevalence figure. The overall MR prevalence in the 1995 Annual Report was 1.11% (see Table 4). Based on the traditional MR literature (e.g., MacMillan, 1982), two-thirds was attributed to EMR and one-third to TMR, yielding EMR and TMR prevalence estimates of 0.75% and 0.36%, respectively. The prevalence of each of the OCR survey disabilities for a hypothetical district of 10,000 students is entered in Column A of Table 11a.

Given the prevalence statistics in Column A of Table 11a, the next step is to determine the number of students in each category of disability. The number in each category is determined by multiplying the prevalence statistics by 10,000. The results of those calculations are given in Column B of Table 11a.

Table 11a. Application of National Prevalence and OCR 1990 Survey Ethnic/Racial Proportions to a Hypothetical School District of 10,000 students.

Column\ Category\ of Sp. Ed.\	A National Percent %	B District Number N	C Asian/NAI %	C N	D Black %	D N	E Hispanic %	E N	F White %	F N
EMR	0.75%	75								
TMR	0.36%	36								
Sp/L	2.28%	228								
SED	0.89%	89								
SLD	5.27%	527								
Total SP.ED.	9.55%	955								

The next step is to determine the distribution of the disabilities by category and group. The percentages reported by Harry (1994) (see Table 4 in this section) by category and group are then entered in columns C, D, E, and F (see Table 11b). Note that there are some rounding errors in the percentages reported by Harry. For example, the row percentages sum to 101 rather than 100 in the rows for EMR, TMR, SI, and SED.

Table 11b. Application of National Prevalence and OCR Ethnic/Racial Proportions to a Hypothetical School District of 10,000 students.

Column\ Category\ of Sp. Ed.\	A National Percent %	B District Number N	C Asian/NAI %	C N	D Black %	D N	E Hispanic %	E N	F White %	F N
EMR	0.75%	75	2%		35%		8%		56%	
TMR	0.36%	36	3%		32%		20%		46%	
Sp/L	2.28%	228	3%		16%		9%		73%	
SED	0.89%	89	2%		22%		6%		71%	
SLD	5.27%	527	2%		17%		11%		70%	
TOTAL Sp. Ed.	9.55%	955								

Then, the numbers of students in each group in each of the disability categories are determined by multiplying the percentages in the columns by the total number of each of the disabilities. For example, 35% of the EMR population was black and, in our hypothetical district there were 75 children diagnosed as EMR, yielding an estimate of 26.25, rounded to an estimate of 26 black children diagnosed as EMR in our hypothetical district of 10,000 students. Using the same procedures, the number of white children in the category of Sp/L is determined by percent of category by the white group (73%) by the total number of students in the Speech/ Language category (228), yielding the result of 166.44, rounded to 166. The numbers for each of the other categories are determined in the same way. The sums in the last row are based on adding together the numbers for each of the disabilities by column. The percentages are based on dividing these sums by the total special education enrollment of 955. The results of these calculations are shown in Table 11c.

Table 11c. Application of National Prevalence and OCR Ethnic/Racial Proportions to a Hypothetical School District of 10,000 students.

Column\ Category\ of Sp. Ed.\	A National Percent %	B District Number N	C Asian/NAI %	C N	D Black %	D N	E Hispanic %	E N	F White %	F N
EMR	0.75%	75	2%	1	35%	26	8%	6	56%	42
TMR	0.36%	36	3%	1	32%	11	20%	7	46%	17
Sp/L	2.28%	228	3%	7	16%	36	9%	20	73%	166
SED	0.89%	89	2%	2	22%	19	6%	5	71%	63
SLD	5.27%	527	2%	10	17%	89	11%	58	70%	369
TOTAL Sp. Ed.	9.55%	955								

The overall results are affected slightly by the rounding errors. The overall effect of the rounding errors is to exaggerate slightly the actual degree of disproportionality by race/ethnicity. The percentages and numbers in the last row of Columns C, D, E, and F indicate the percentage of the special education population by each group and the number of students from each group who would be in special education. For example, there are 659 white students in our hypothetical district in special education, and white students

constitute 659 of the 955 students in special education or 69% of the students in special education. A total of 96 Hispanic students are in special education, constituting 10% of the special education population. It is important to note that all of the percentages in Columns C, D, E, and F of Tables 11b and 11c reflect the percent of special education categories by group. The disproportionality shown in Table 11c often is expressed in statements like, "Although black students were 16% of the general population, they were 35% of the EMR enrollment." The issue of what proportion of black students were in EMR remains to be determined in the next table, Table 11d.

Thus far in our analysis of a hypothetical district of 10,000 students we have focused exclusively on percent of program by group statistics. The next set of calculations involve determining the percent of each group in special education programs. The first step is to determine the total number of students from each of the groups in our hypothetical district of 10,000 students. The population proportions in the 1990 OCR survey districts were Asian-Pacific Islander= 4%and Natvie American= 4%; Black= 16%; Hispanic= 12% and white= 68%. Four percent of 10,000 is 400, the number of Asian Pacific Islander and Native American Indian students in the district. In like manner, the percentages for the remaining groups multiplied by 10,000 yields 1600 black students, 1200 Hispanic students, and 6500 white students.

The percent of each group in special education can then be determined by dividing the number in special education by the total number of students in the group. Those results are shown in the last row of Table 11d. The actual percent of black students in special education in the five categories surveyed by OCR is 11.4%. This is slightly higher than the proportion of white students in special education, 9.7%. Is this degree of discrepancy a problem? The answer depends entirely on the criteria used to evaluate minority and non-minority enrollment in special education, the subject discussed in the next section.

Table 11d. Application of National Prevalence and OCR Ethnic/Racial Proportions to a Hypothetical School District of 10,000 Students.

Column\ Category\ of Sp. Ed.\	A National Percent	B District Number	C Asian/NAI		D Black		E Hispanic		F White	
	%	N	%	N	%	N	%	N	%	N
EMR	0.75%	75	2%	1	35%	26	8%	6	56%	42
TMR	0.36%	36	3%	1	32%	11	20%	7	46%	17
Sp/L	2.28%	228	3%	7	16%	36	9%	20	73%	166
SED	0.89%	89	2%	2	22%	19	6%	5	71%	63
SLD	5.27%	527	2%	10	17%	89	11%	58	70%	369
TOTAL Sp. Ed. By Group	9.55%	955	2%	21	19%	181	10%	96	69%	657
Percent and Number of Each Group In Total Pop.	**% N 400**	**4% 1600**	**16%**		**12% 12006800**		**68%**			
Percent of Each Group in Sp. Ed.		**21/400 5.25%**	**181/1600 11.31%**		**96/1200 8.00%**		**657/6800 9.66%**			

Several conclusions are apparent from this computational example. First, the degree of overrepresentation apparent across the five categories is not impressive regardless of which statistic is used. Overall rates of special education by group show only slight overrepresentation of black students who were 16% of the overall population, but 19% of the special education population. The degree of overrepresentation appears to be large for only one category, mental retardation, where black students were over-represented in both EMR and TMR. This result can be dramatized by statements like, "Although black students were 16 percent of the overall population, 35% of the EMR population was black and 32% of the TMR population was black." The actual percent of black students in EMR was 1.63% (26/1600). The percent of black students in TMR was only 0.69% (11/1600). As noted throughout this section, the **perception** of overrepresentation is vastly different depending on which statistic is used: percent of special education program by race/ethnicity (e.g., 35% of EMR is

black) vs. percent of group in special education program (1.63% of black students are in EMR).

Summary and Implications

1. Disproportionate minority representation statistics are deceptively simple. The nature and characteristics of disproportionate minority representation statistics must be presented carefully so that misunderstanding simple statistics is not the basis for policy changes or legal action.
2. Presentations based on percent of program or disability category by group typically suggest significant disproportionate minority representation. In contrast, presentations based on percent of group in program or disability category typically show relatively small degrees of disproportionate minority representation and small proportions of minority students affected by the disproportionate minority representation.
3. Overrepresentation occurs in a number of educational programs including Chapter I, Head Start, and Follow Through. Despite overrepresentation in a variety of programs, litigation and OCR scrutiny have focused primarily on special education programs. Critical assumptions about special education appear to explain the different treatment of programs in which disproportionate minority representation occurs.
4. Patterns of disproportionate minority representation are not consistent across groups. Generally, African-American children and youth are over-represented in special education. In contrast, Hispanic children and, to an even greater extent, Asian-Pacific children and youth, are under-represented in special education. Native American children are slightly over-represented in special education, although their numbers in the general population are quite small and their representation in the OCR studies was limited.
5. The greater incidence of poverty is related to level of special education representation among African-American and white families. Controlling for poverty status typically narrows significantly the differences in African-American and white rates of special education representation.

Part IV: Analysis and Decision-Making

A fundamental issue after the proportions of various groups in different general and special education programs have been determined is, How large a difference constitutes significant disproportionality? Unfortunately, there is no clear, universally accepted criterion. Criteria that have appeared in the literature or in the reports of various agencies will be reviewed in this section. If the disproportionate minority representation meets the criterion established, the next step is consideration of different conceptions of fairness which, in turn, influence the goals of subsequent analyses and system changes. Regardless of the conception of fairness adopted, however, all educational agencies must ensure, at a minimum, attainment of the equal treatment standard. Failure to achieve equal treatment in any aspect of general and special education should lead to immediate changes in educational policies and practices. Guidelines and examples of studies of equal treatment are discussed as the concluding portion of this chapter.

Criteria to Examine Patterns of Disproportionate Minority Representation

As noted and illustrated thoroughly in the previous chapter, the first step in any analysis of disproportionate minority representation is determining the kind of percentage is to be used: percent of program by group or percent of group in program. Generally, state and federal governmental agencies responsible for monitoring local school districts prefer to use percent of program by group statistics while school districts generally prefer to use percent of group in program statistics. State and local educators are well advised to know both statistics in any monitoring activity and to insist on the use of percent of group in program statistics as well as percent of program by group in negotiations with monitoring agencies. A crucial first step, then, is to analyze representation patterns using different statistical indices.

Survey of State Criteria

Lara's (1994) survey indicated that although 32 states were collecting special education enrollment data by race and ethnicity, only six states reported formal follow-up procedures with districts. The follow-up procedures in two of the states (Arkansas and California) will be discussed in this section. Four other states have follow-up procedures of varying degrees of complexity. Illinois and Massachusetts were listed as using an unspecified means to compare disproportionality statistics to state averages. Criteria to judge the degree of difference as overrepresentation and follow-up procedures were not listed for either state. The states of New Mexico and

Pennsylvania were listed in Lara's (1994) report as using a 5% criterion above the district's overall minority proportions. The kind of percentage criterion, i.e., whether it was the population proportion plus 5% **of the population proportion** or the population proportion **plus 5%** was not specified. It is likely, however, that the New Mexico and Pennsylvania criteria were the population proportion **plus** 5%.

The different ways of using a percent limit of the amount of over- or under-representation need to be clarified. A 10% criterion is used as an example. The 10% criterion might mean 10% of the population proportion plus or minus the population proportion **or** it might mean the population proportion plus or minus 10%. An example will clarify the differences.

> Given that a minority group constitutes 20% of the overall student population.
>
> What degree of difference constitutes overrepresentation that should be investigated further?
>
> The 10% of the overall population proportion plus the population proportion criterion would establish an upper limit of 22% and a lower limit of 18% (10% of 20% = 2%; 20% + or - 2% = 18% and 22%).
>
> The population proportion plus or minus 10% would establish an upper and lower limits of 30% and 10%, respectively (20% + or - 10% = 30% to 10%).

Although both are referred to as the ten percent criterion for overrepresentation, they are different mathematically and they produce significantly different decisions about overrepresentation. In all applications of a percent criterion to population proportions, it is essential to distinguish between percent of the population proportion and percent plus or minus the population proportion.

Office for Civil Rights and Iowa Equity Education Criteria

The federal Office for Civil Rights (OCR) does not, to my knowledge, have an official criterion for determining the degree of difference required to constitute significant overrepresentation. Anecdotal commentary by persons who have worked with the OCR investigations of school districts suggest that a 20% criterion is used; however, it is not clear whether it is the 20% of the overall population proportion or the 20% plus the population proportion. It is likely that if OCR has a 20% criterion, it is 20% of the population proportion rather than the population proportion plus 20%.

According to the Iowa Department of Education, a 10% criterion is used with Iowa districts to select those districts that need to be investigated further

regarding their student classification and placement procedures. However, the 10% criterion is understood in Iowa to mean 10% plus the minority population proportion rather than the Chinn and Hughes (1987) ten percent criterion.

Chinn & Hughes (1987) Criteria

In an article analyzing the OCR survey data, Chinn and Hughes (1987) suggested a criterion of ten percent of the population proportion plus (for overrepresentation) and minus (for under-representation) the population proportion. For example, if Native American Indians constituted 20% of the overall school population, their representation in various general and special education programs should be no more than 22% and no less than 18% according to the Chinn and Hughes criteria. If the population is 67% white, then the program percentages should be within the limits of 60.3% to 73.7%.

The Chinn and Hughes criterion is a kind of confidence interval around the percent of the overall population by group. It is important to note that the amount of acceptable variation for a group is determined by the proportion of the group in the general population. For example, if 3% of the overall population is Hispanic, the Hispanic representation in different general and special education programs can vary only from 2.7% to 3.3%, an exceedingly narrow range. However, if the Hispanic group was 50% of the overall population, the acceptable range of variation in different general and special education programs is 45% to 55%. The results of applying this criterion to the OCR survey data are reported in Table 12 on page 72.

Table 12. Percentage of Blacks Enrolled in Each Category of Exceptionality (reproduced verbatim from Chinn & Hughes, 1987, pp. 43)

Category	1978	1980	1982	1984
EMR	38.01[a]	45.30[a]	54.01[a]	48.30[a]
TMR	27.16[a]	30.57[a]	37.08[a]	33.18[a]
SED	24.36[a]	28.56[a]	32.35[a]	30.82[a]
LD	15.08	19.81	27.25	25.55
SI	14.75	18.90	25.50	23.65
G/T	10.30[b]	11.10[b]	11.00[b]	12.92[b]
African-American % of Overall Enroll	15.72	20.07	25.81	24.52

Notes: EMR=educable mentally retarded; TMR=trainable mentally retarded; SED=seriously emotionally disturbed; LD=learning disabled; SI=speech impaired; G/T=gifted and talented

Hughes and Chinn defined over- and under-representation as a rate more than 10% above or below the proportion of the group in the general population.

[a] indicates pattern of overrepresentation, based on the criterion of 10% more than the overall enrollment percent, e.g., in 1978 when black students constituted 15.72% of the overall enrollment, the upper bound is 17.29% (15.72% + 1.57%=17.29%); the lower bound is 14.15% (15.72% - 1.57%=14.15%).

[b] indicates pattern of under-representation (based on less than 10% of the overall enrollment

Although the use of the **10% of the** population proportion is not entirely clear, one of the NASDE Project Forum documents suggested this criterion for examination of the 1990 OCR national survey data (Lara, 1994, p. 2-3). It was not clear whether this criterion was recommended by OCR; however, it is a rather stringent criterion that has at least some acceptability in the scholarly and research community.

Arkansas Department of Education Compliance Monitoring

The special education section of the Arkansas Department of Education developed a system of "red flagging" districts that had significant overrepresentation of minority children in special educator programs. Arkansas used an overrepresentation statistic that was computed by determining the difference between the overall

proportion of minority students in the district and the percent of special education students that was minority. In virtually all Arkansas school districts the dominant and, frequently, the only minority group was African-American students. The Arkansas statistic is the now familiar percent of group by program.

The Arkansas procedure to identify districts with excessive overrepresentation in special education. Involved the following steps.

- Enrollments in special and general education were determined using the statistic of percent of program or category by group. For example, the general education population might be 45% black and the special education population might be 55% black. The difference in program enrollment rates is 10% in this district according to the Arkansas procedure.
- Districts with enrollments that were 95% or more of one race were excluded from further analyses.
- The distribution of difference scores was compiled for the remaining districts and descriptive statistics computed for this distribution.
- The standard deviation of the distribution of difference scores was 8.3%; then, districts with minority general and special education enrollment differences of greater than 8.3% were "red flagged."
- "Red-flagged" districts were required by the Arkansas Department of Education to develop and submit a written plan for addressing the possible overrepresentation of black students in special education, including, but not limited to, reviewing the district's referral/placement procedures. (Arkansas Department of Education, nd, p. 4)

In 1991 a three-year plan was described for districts to analyze overrepresentation of black students in special education. The critical elements of this plan were extensive statistical analyses of enrollment patterns in different programs (e. g., Chapter I and special education resource teaching program) by district and by school attendance center within district. In attendance centers with significant overrepresentation, further analyses were to be done based on a sample of student records for white and black students. Equal treatment comparisons (see the next section for discussion of this methodology) were then conducted with a biracial sample of records using variables such as a) grade retention history; b) behavior problems identified in the referral, c) multidisciplinary team composition; d) number, kind, and quality of the evaluation instruments used in the preplacement evaluation, e) adaptive behavior assessment and results; f) current intellectual assessment and results, g) achievement test results, h) parental involvement in the staffing, i) placement option (resource vs. special class), k) amount of time in placement, l) triennial evaluation conducted in a timely manner, and m) annual review conducted properly and on time.

A workshop handout developed by this author as the basis for a full day inservice for Arkansas special educators was appended to the materials distributed to school districts. This author's approach to conducting equal treatment studies to assess possible sources of discriminatory treatment appears to have been adopted by Arkansas. In addition to this outline, the Arkansas Department of Education distributed an extensive protocol that districts were urged to use as a self-assessment device to identify continuing education needs. The self-assessment also prompted district personnel to make greater use of general education options for students with academic or behavioral problems.

The degree of overrepresentation in Arkansas apparently was reduced through this methodology. Although I have not seen any statistical analyses of the number of districts involved or the degree to which overrepresentation was reduced, conversations with Arkansas officials clearly suggest that these procedures have contributed to reducing overrepresentation. Other influences in Arkansas also need to be recognized. The methodology was developed in a context that was influenced by continuing school desegregation litigation. Although not the central theme, one of the plaintiffs' allegations was that special education contributed to the continued segregation of Arkansas students by race.

Another event undoubtedly had an impact. The special education section of the Arkansas Department of Education released information to the state's largest newspaper on the percents of each district's general and special education programs that were African-American. The publication of the percents of general and special education programs by group, of course, gives the impression that a large proportion of minority children are in special education. The embarrassment of being singled out in a newspaper with wide circulation in the state also contributed significantly to districts' motivation to engage in the self-study exercises suggested by the Arkansas Department of Education.

Mattie T. v. Holladay, (1979) Criterion

Mattie T. was a class action suit brought on behalf of students with disabilities in Mississippi that alleged, among other things, that black students were over-represented in special classes for the MMR and under-represented in SLD classes. According to one published analysis of the *Mattie T.* facts, " ... black students were placed in EMR classes at a rate 3 times that of white children, and white children were placed in SLD classes at a rate nearly 3 times that of black children." (*Mattie T. v. Holladay*, nd, p. 24). In a consent decree, the parties agreed to the following provision, "The (State) Department (of Education) shall take all steps necessary to bring the EMR placement rate difference to less than 1.9% and the SLD placement rate

difference to less than 0.25% in each district in the state ... " (*Mattie T. v. Holladay*, Consent Decree, 1979, content added in parentheses). From the context of this sentence, it appears that the *Mattie T.* Court was referring to the statistic of percent of group in program.

The base rates for the EMR and SLD categories were the state-wide incidence rates for small enrollment school districts. For school districts with one thousand or more students, the local district's EMR and SLD proportions were to be used in determining if impermissible overrepresentation existed.

The extremely narrow range of difference allowed in the black and white placement rates in SLD is unprecedented as far as I can determine. The difference allowed is .0025, no more than 25 per ten thousand students. For example if the SLD placement rate for white students in a Mississippi school district is at the national average of 5.27%, the Black SLD placement rate could not vary beyond 5.02% and 5.52%. The *Mattie T.* range of permissible variation in the MMR category is much broader, being over seven times larger than the permissible SLD range.

Although ironic, it appears that the variations in MMR and SLD placement rates in the 1990 OCR national survey would meet the *Mattie T.* guidelines for SLD **and** MMR (see Table 5 on page 55). The black and white MMR placement rates in the 1990 OCR national survey were 2.10% and 0.81%, respectively, yielding a placement rate difference of 1.29%, which is well within the *Mattie T.* criterion of 1.9%. The black and white SLD placement rates were 4.95% and 4.97%, respectively. This difference even meets the extremely restrictive limits of the *Mattie T.* Court for the SLD placement difference.

Although the *Mattie T.* consent decree appears to establish a nearly impossible criterion for the permissible proportions of black and white students in MMR and SLD, the actual national placement rates in the 1986 and 1990 OCR surveys were within the *Mattie T.* guidelines. Nevertheless, the *Mattie T.* guidelines, particularly for SLD, appear to be excessively stringent.

The California E-Formula

The *Diana* and *Larry P.* court cases established limits on the enrollment of Hispanic and African-American children and youth in special education programs. The actual application of these limits has never been clear. For example, do the *Larry P.* limits on African-American representation in special education apply to all special education programs, or, like the IQ test ban, only to "dead-end," programs such as EMR? Does the ban on Hispanic overrepresentation apply only to the category of MMR, the focus of the *Diana* consent decree, or to all disability categories and special education programs? As noted in

statements to the *Crawford/Larry P.* Court in 1992, many California school districts had African-American special education enrollments in excess of the E-formula limits. Application of the E-formula on behalf of Hispanic children has been unnecessary, with rare exceptions, because of the general under-representation of Hispanic students in special education.

According to one description the E-formula is used to " ... compute the standard error of the minority group percentage of the entire school population, and adds that amount to the minority group percentage, thus defining the limit for the minority group percentage of the special education population" (Anderson, 1988). It is computed as follows:

$$E = A + \text{the square root of } \frac{(A)(100 - A)}{N}$$

where E is the maximum percentage of the group allowed in a special education category

A is the percent of the group in overall population

N is the total number of students in the special education category

For example, assume that the proportion of black students in the district is 16% and that the total number of students in the SLD category is 1056. Then the maximum percentage of black students in the SLD category allowed by the E-formula is determined by:

E= 16 + the square root of (16)(84)/1056
E= 16 + 1.13
E= 17.13%.

In this example, the degree of overrepresentation is very small. According to the E-formula in the above example, black students were 16% of the general population, and could not be more than 17.3% of the SLD population, an extremely small amount of variation from the overall population percentage.

The E-formula limits are greater if the number of students in a special education category is small. Consider this example: Assume the proportion of black students in the district is 16% and that the total number of students in the category of visual impairments is 9. Then the total proportion of black students in visual impairments permitted by the E-formula is 28.22%.

i.e., E=16+ square root of (16)(84)/9
E=16+ square root of 149
E=16+ 12.22
E=28.22%

Based on these two examples some characteristics of the E-formula are apparent. First, the larger the number of students in a particular disability area, the **smaller** the degree of overrepresentation permitted. Conversely, the lower the number of students, the larger the degree of overrepresentation permitted by the

formula. Applying the E-formula can produce some rather interesting anomalies. For example, consider the data in Table 11d on page 67 which was constructed with, as the reader may recall, population and special education category percentages from the 1990 OCR national survey of school districts. Now consider the representation of white students in the category of speech/language impaired. In our hypothetical school district of 10,000 students 228 students were in speech/language impaired. White students constituted 73% of the students in the speech/language impaired group, but 69% of the students in the general population. The E-formula produces the following result:

E= 69%+ square root of (69)(31)/228
E= 69%+3.06
E= 72.06%

According to a strict application of the E-formula, white students are over-represented in the category of speech/language impairment to an impermissible degree. Now, this conclusion, on the face of it, seems absurd. It does illustrate, however, how the E-formula works and how stringent it is in requiring nearly identical percentages of all groups in the "high incidence" special education categories and programs. This degree of restrictiveness is not without precedent, particularly in court-mandated solutions to disproportionate minority representation.

Analysis of Treatment and Decision-Making

The next steps in the consideration of disproportionate minority representation in special education are determination of whether minority and non-minority students are treated in comparable ways and, if there is equal or comparable treatment, whether there are plausible explanations for overrepresentation of minority students in special education. Depending on the criterion of fairness adopted by the agency or institution, equal treatment or equal results, subsequent steps will differ. Prior to considering conceptions of fairness, it is important to examine assumptions about proportionate representation.

Equity and Assumptions About Proportionate Representation

At this point in the discussion it is necessary to ask a potentially controversial question, What degree of departure from proportionate representation, if any, is acceptable? There are different criteria which, implicitly, define the acceptable range of disproportionate representation. Some of the criteria are extremely stringent while others are more lenient. What should be the basis for determining whether further investigation is indicated, a clear and unequivocal pattern of over- or under-representation or merely suggestions that the overall proportions are not precisely equal?

I know of no way to make these decisions without considering other factors such as whether a history of discrimination exists regarding the group that is over- or under-represented and the relative importance of equating representation of groups in the category, program, career, or other grouping under consideration. If a history of discrimination exists, and if the representation patterns meet some specified discrepancy criterion, then further investigation is warranted. Depending on the outcome of that investigation and the conception of fairness adopted in decision-making, remedial action to change patterns of representation may be required.

Equal Treatment Criterion of Fairness

The equal treatment criterion of fairness specifies that individuals are treated in the same way at all stages of general and special education program decision-making regardless of race, ethnicity, or social class. Equal treatment is operationalized by carefully studying whether the students in the same educational programs have comparable characteristics on the critical variables that are the basis for program selection. If given the same student performance, educational professionals make the same decisions regardless of race, ethnicity, or social class an equal treatment criterion of fairness is achieved. If equal treatment has been achieved, then students in the same educational programs should have highly similar educational histories and highly similar current characteristics. Situations in which different groups of students in the **same** programs have significantly different current characteristics or markedly dissimilar educational histories are likely to involve discriminatory treatment that would violate federal and state law. Regardless of one's position on proportionate representation, equal treatment is essential to fairness.

Equal Results Criterion of Fairness

The equal results criterion of fairness involves a much higher standard for educational decision making because it requires, in essence, that **different** decisions are made about persons who have the same educational characteristics so that the same outcomes are achieved for diverse groups in educational classification and placement. Thus, different decisions are made about minority and non-minority students who have the same educational profiles. Depending on what is required to achieve equal results in program proportions, sutdents with the same educational histories and assessment profiles are placed differently. Equal results involves some degree of reverse discrimination, usually justified as a temporary expedient to overcome the present effects of past discrimination.

Which Way? Equal Results or Equal Treatment?

It is clear that the discussion has progressed to one of the most difficult, divisive, and intractable issues in current political, economic, and social policy. The names of federal court decisions such as *Bakke* in the late 1970s and *Hopwood* in the mid-1990s come to mind almost immediately in our consideration of these issues. A good case could be made for the assertion that themost difficult issue as a society is determination of the right course to achieve fairness forall: through the equal treatment or through the equal results conceptions of fairness. Unfortunately, either approach has critical flaws.

Equal treatment has the huge disadvantage of delaying for decades, if not centuries, redress of and compensation for past racial and ethnic discrimination. Indeed, equal treatment works very slowly as a means to ensure equitable treatment of all groups. Group equity will not be achieved for a very long time and, perhaps, never will achieved, if we, as a society, pursue fairness only through equal treatment mechanisms (Sowell, 1996). For the purpose of achieving **group equity**, equal results is a superior mechanism of apportioning goods, services, and opportunities; however, equal results has the fatal flaw of **treating differently persons who are the same,** a practice that is inevitably unfair to some individuals and generally banned under current interpretations of the U.S. Constitution.

As a society we truly are on the horns of a dilemma and the current social and political discourse does not appear to be moving to a consensus on how to simultaneously achieve individual and group equity. Likewise, in general and special education program representation, we have not achieved a consensus on which should prevail, the equal treatment or the equal results conceptions of fairness. There is a consensus, however, on the necessity of equal treatment. Any evidence of failure to achieve an equal treatment conception of fairness is discriminatory and must be remedied immediately.

Studies of Equal Treatment in General and Special Education

An absolute prerequisite to nondiscrimination is equal treatment of students regardless of race, ethnicity, social class, or gender. Disproportionate minority representation in general and special education should be seen as a symptom of **possible** discrimination that leads to focused examination of the entire process of screening, referral, classification and placement of students in different general and special education programs. The methodology for equal treatment studies is relatively straightforward. It involves the following characteristics:

1. Random selection of groups of minority and non-minority students who are in the same general or special education program. Studies based on only one group are never

sufficient to establish equal or unequal treatment.

2. Sample sizes of at least 20, preferably 30, per group must be used so that sufficient statistical power exists to detect differences in treatment if, in fact, such differences exist. In addition to limited statistical power, studies involving small sample sizes are less likely to establish a reliable portrayal of typical practices.
3. Information indicating group membership is then systematically removed from the records. This step usually involves removing information on demographic characteristics, names, and addresses. The purpose of "blinding" the cases is to guard against subtle biases in coding the data.
4. Variables are created (see later discussion) that reflect screening, prereferral, referral, assessment, classification, IEP development, placement, annual review, and triennial reevaluation.
5. Variables are coded for each case by (a) person(s) who do/ does not know the student's race, ethnicity, social class, or ethnicity.
6. After all of the variables are coded, the race, ethnicity, social class, or gender of the case is entered into the data set.
7. Statistical analyses are conducted on all variables comparing the groups to determine if evidence of unequal treatment exists. Statistically significant findings indicate unequal treatment. The statistically significant findings are examined further for possible discriminatory treatment. Some statistically significant findings may **not** be indicative of discriminatory treatment while other statistically significant findings may be clear indications of discrimination.

The last point may need further elaboration. An example of a statistically significant difference that does not indicate discrimination or, for that matter, unequal treatment, emerged from a detailed study of African-American and white students in programs for students with SLD in Wilmington, Delaware. African-American students were over-represented in the SLD program at a rate that was about twice their numbers in the general population. The analyses of a large number of variables yielded a few statistically significant differences, none of which were indicative of discriminatory treatment (Starkweather, 1995). One difference was on level of reading on standardized measures of achievement. African-American students in the SLD category had lower

reading score averages over several measures of reading. The major implication of these differences in reading scores was, the greater need of African-American students for academic interventions. The lower reading scores did not, indicate discriminatory treatment in the overall context of this study which found virtually no differences in African-American and white students in the same special education category and program option.

The key variables in equal treatment studies will differ depending on the educational program and the procedures associated with the placement of students in that program. There are considerably fewer variables available for study of different groups in a Chapter I program than a special education program because the latter involves a more complicated process. Equal treatment studies in special education programs might be designed around the key stages of the referral, classification, and placement process.

An equal treatment study was conducted as part of the State of Georgia's preparation for the trial in *Marshall v. Georgia* (1984, 1985). Samples of 40 African-American and 40 white students classified as MMR and placed in special classes were randomly selected. The records for each student were collected and information indicating race was deleted. The steps for conducting an equal treatment study were completed using the variables listed in Table 13.

Several findings illustrate the importance of various methodological steps in equal treatment studies. For example, at issue in the case was the placement of students with IQs slightly over the standard used in Georgia of two standard deviations below the population average of 100 (i.e., IQ<70). The plaintiffs located a few cases in which black students with IQs slightly over 70 were classified as MMR and placed in special education. The plaintiffs suggested that such placements were part of a comprehensive pattern of discriminatory treatment of African-American students in special education. The equal treatment study permitted an analysis of whether this was a common practice and whether it also occurred with white students.

The equal treatment results revealed that five African-American and four white students in the samples had IQs above 70, and no student in the sample had an IQ over 73. Clearly, some degree of flexibility or discretion was used by the defendants in the application of the IQ standard in MMR; however, discretion was exercised rarely and about equally with African-American and white students. Absent the equal treatment study, it would have been impossible to estimate the frequency of classification and placement as MMR of students with IQs slightly above 70 or the frequency with which it occurred with African-American and white students.

Table 13. Dependent Variables in an Equal Treatment Study in the Defendant Districts in *Marshall v. Georgia*, (Reschly & Kicklighter, 1985)

Current age	Age at initial placement
Initial placement IQ	Initial reading level
Initial math level	Years in special education
Current reading level	Current math level
Retention in grade before referral	Grade at initial referral
Mainstreaming hours per week	Kind of mainstreaming
Initial behavior problem checklist	Initial peer relations
Current IQ resource placement	Current peer relations
Parents at initial staffing	Parents at reevaluation staffing

IEP goals (number of academic goals
IEP goals (number of non-academic goals)
Initial placement (resource v. special class)
Evaluation methods specified in IEP
Current placement (resource or special class)
Staffed out of special education for a trial period within the last three years
Referral reasons (learning alone vs. learning and behavior problems)
Initial placement IQs, percent with IQs >70 and < 70
Current IQ special class placement
Triennial reevaluation (on time or not on time)

A more extensive equal treatment study was conducted in the four Delaware school districts in the *Coalition et al.* (1995) litigation. The variables at each stage of the prereferral to placement process are listed in Table 14. The steps for conducting equal treatment studies were implemented rigorously. The statistical analyses produced a few statistically significant differences, none of which indicated discriminatory treatment of African-American students. Although African-American students were overrepresentation in special education, the available evidence suggested that an equal treatment conception of fairness was attained by the districts.

Table 14. Variables Used in Equal Treatment Study in Four Delaware Districts

Prereferral and Referral Stages

Sensory deficits
Number of prereferral
Interventions in regular education
Number of ODD symptoms
Internalization symptoms
Chapter I (Yes/No)
Distractibility
Negative reaction to authority
Aggressive behavior
Poor self-concept
Withdrawal
Suspected development lag
Referral concern with achievement levels
Grade referred
Suspected speech/language problem
Number of ADHD symptoms
Home/school problems
Cognitive symptoms
Hyperactivity
Poor peer relations
Unacceptable school behavior
Truancy
Tension/anxiety
Docile/passive
Referral concern with level of intelligence

Comprehensive Evaluation: Eligibility and Need

Verbal IQ
Performance IQ
Achievement (PIAT, W-J Achievement, KTEA, WRAT)
Number of achievement areas discrepant from IQ
Internalization symptoms
Intellectual deficit symptoms
Reality testing symptoms
Total symptoms checklist score
Sensory Deficits
ADHD Symptoms
ODD Symptoms
Teacher's estimate of instructional level in math
Number of absences
Teacher's estimate of instructional level in reading
Instructional difference in math (grade placement and teacher's estimate)
Instructional difference in reading (grade placement and teacher's estimate)
Size of discrepancy using the best test score in basic reading
Size of discrepancy using the best test score in reading comprehension
Size of discrepancy using the best test score in math computations
Size of discrepancy using the best test score in math reasoning
Oral expression learning disability
Listening comprehension learning disability
Basic reading learning disability
Reading comprehension learning disability
Mathematics computation learning disability
Mathematics reasoning learning disability
Behavior problem checklist used as part of the evaluation
Excessive self-blame
Excessive withdrawal
Excessive anxiety
Excessive dependency

Poor ego strength
Poor physical strength
Poor intellectuality
Poor attention
Poor reality contact
Excessive suffering
Excessive aggressiveness
Poor social conformity
Poor sense of identity
Poor coordination
Poor academics
Poor impulse control
Excessive sense of persecution
Poor anger control
Excessive resistance

IEP Development and LRE Considerations

Family member at initial IEP
Grade at initial placement
Number of IEP social goals
Minutes in special education
Number of IEP academic goals
Total number of IEP goals

Evaluation of Program Effects, Annual Reviews, and Triennial Reevaluation

Family member at annual review of IEP
Family member at triennial Reevaluation

A final example of an equal treatment study is the matched sample comparison of African-American and white students classified as MMR in the State of Iowa (Reschly & Ward, 1991). Assessment of current intellectual functioning was nearly universal for both samples; however, assessment of adaptive behavior was far less common and, when assessed, the adaptive behavior measures often were technically inadequate. For example, adaptive behavior was not assessed with 11% of the African-American students. Is this indicative of unequal treatment and of discrimination? In fact, adaptive behavior was not assessed for 20% of the white students in the sample. The appropriate conclusion in this situation is that assessment of adaptive behavior needs to be improved generally, with both African-American and white students. If the record review had been restricted to African-American students, however, a different conclusion might have been established, perhaps suggesting that MMR classification with African-American students is discriminatory because adaptive behavior had not been assessed.

Achievement of an equal treatment criterion of fairness is essential to all conceptions of equity. Failure to treat persons with similar characteristics in comparable ways, IF the pattern of unequal treatment has the effect of depriving minority group students of membership in coveted groups or opportunities for educational or career advancement, should be and is condemned by the courts as well as forbidden by federal and state law. I cannot stress too much the absolute necessity of meeting an equal

treatment criterion of fairness. Any evidence that similar persons are treated differently in educational decision-making should prompt an immediate investigation and, where indicated, immediate changes in decision-making.

Questioning Orthodox Assumptions About Group Proportions

Before leaving this topic the views of some persons who question the assumptions about equal proportions should be considered briefly. Sowell, a noted conservative critic of current orthodoxy regarding race and social class, reported the following conclusions from his study of the development of various immigrant groups around the world.

> Another worldwide study of multiethnic societies found "few, if any" which even approximated proportional representation of the different ethnic groups in different levels or sectors of the economy. (Sowell, 1996, p. 372)
>
> Behind such striking patterns around the world and down through history is the simple fact that skills have never been evenly or randomly distributed, whether between ethnic groups, nations, regions, or civilizations. (Sowell, 1996, p. 373)

Sowell's conclusions should not be accepted without questions or applied uncritically to the phenomenon of disproportionate minority representation in general and special education programs. We should never accept patterns of minority over- and under-representation in educational programs as the natural order of the universe. Instead, as noted several times in this section, disproportionate representation in general and special education programs should be investigated to ensure implementation of equal treatment. Much more must be done before large differences in educational program representation are found acceptable. Sowell's conclusions about race, ethnicity, and social class should give us reason, however, to consider our assumptions about proportionate representation in educational programs.

Willingness to accept as valid and fair, at least philosophically, disproportionate representation in educational programs almost always brings up what Piaget called the American questions: What is the source of such differences, hereditary or environment? and What can be done to accelerate development? On these questions the evidence according Sowell is far less clear. In fact he concludes, "Both hereditary and environmental explanations of group differences encounter serious problems in the light of history" (Sowell, 1996, p. 375). He then provides examples of the development of various groups that cannot be understood easily from either a hereditarian or environmental

explanation. Perhaps the most important of Sowell's points has to do with the matter of blame:

> The fashionable but false dichotomy between 'blaming the victim' and blaming 'society' ignores factors for which no blame is in order. Clearly, no one can be blamed for cultural developments which took place before he was born, or for the geographical settings in which those cultural developments took place. (Sowell, 1996, p. 377)
>
> Widely varying amounts and kinds of cultural capital make economic and social disparities among groups and nations virtually inevitable. Yet, the political temptation is to overlook the causal influences of differences in cultural capital which often go far back into history and, instead, to attribute these disparities to current failures of society. (Sowell, 1996, p.382)

The assumption that equal proportions should exist in all sectors of society, including general and special education, ignores everyday observations as well as historical patterns. Groups in the U.S. have contributed differentially to our national development across the realms of literature, art, entertainment, science, mathematics, music, commerce, and athletics. For the most part, free market mechanisms or absolute standards of various kinds prevent the imposition of tight quotas in many areas of human achievement, thus, permitting the development of disproportionate representation of groups in a wide variety of areas. Such standards or markets are less well accepted in the context of public education.

One of the negative implications of assertions of proportionate representation is the almost inevitable discrimination against the members of high achieving groups such as Jewish-Americans and Asian-Americans. In fact, informal, but effective, quotas limiting the number of Jews admitted to professional training programs (e. g., law, medicine) were established and enforced in the first forty to fifty years of this century. The effect of the quotas was to admit less qualified non-Jews to highly competitive slots in the top professional schools, particularly in the eastern region of the U.S. A similar result could occur today with Asian-American students if tight limits are established for representation in gifted and talented programs. Consider the data in Table 4. Asian-American students were three percent of the student population in the 1990 OCR survey, but 6% of the students in the gifted and talented category. In order to produce proportionate representation, should half of the Asian-American students in gifted and talented programs today be dismissed from those programs? That result seems quite unfair on the face of it; however, tightly constructed limits to ensure proportionate representation inevitably have that effect.

As noted in an earlier section of this paper, there are no easy or simple solutions to issues associated with minority over- and under-representation in educational programs. Equal treatment, however, can be seen as a prerequisite to fairness. This essential prerequisite to fairness has been violated in the past, through nearly a century state-mandated segregation of schools and through documented instances of clearly inferior special education programs (*Diana*, 1970; *Guadalupe*, 1972). **Educators and psychologists must focus on an equal treatment criterion as part of the response to disproportionate minority representation in educational programs. The steps beyond the satisfaction of the equal treatment criterion of fairness are not at all clear; however, one promising avenue is to improve the capacity of general education to provide effective programs to minority children and youth with learning and behavior problems. Increasing the general education capacity to accommodate individual differences may prevent patterns of over- and under-representation in various educational programs.** Attention will be focused on prevention in the next section.

Summary

1. Different criteria exist to determine if a difference between minority and non-minority placement rates is excessive. The criteria vary in stringency and complexity. None of the criteria have achieved dominance or even widespread application.
2. The criteria to define excessive disproportionate minority representation in special education are easily misinterpreted. Again, a distinction among different percentage statistics is necessary. Interpretations of the criteria must distinguish between percent of population proportion plus or minus the population proportion vs. percent plus or minus the population proportion.
3. Conceptions of fairness are widely disputed in this society. Part of the difference arises in whether or not proportionate representation of all groups in all significant areas is expected and, if necessary, steps taken to produce equal representation.
4. The equal treatment and equal results conceptions of fairness have differing strengths and disadvantages, as well as different implications for disproportionate minority representation in general and special education. Equal treatment is fundamental to nondiscriminatory treatment of children and youth. Evidence of unequal treatment of children and youth with comparable characteristics that produces diminished opportunities is discriminatory according to federal and state legal protections and requires immediate corrective action.

5. Application of the equal results criterion of fairness to special education decision-making is especially difficult because, in special education, all program placement decisions are made individually. These decisions are guided by extensive federal and state legal requirements, some of which might place schools and states in legal jeopardy if different decisions are made about persons who are essentially the same.
6. A methodology exists for conducting equal treatment examinations of general and special education programs. This methodology should guide efforts to assess the implementation of equal treatment in districts or states with disproportionate minority representation in special education.
7. Although only a few equal treatment studies have been conducted to date, the results support the assertion that minority students in districts and states with disproportionate minority representation in special education were treated equally at the stages of prereferral, referral, evaluation, classification, placement, annual review, and triennial reevaluation.

Part V: Prevention of Disproportionate Minority Representation

Prevention of disproportionate minority representation is the focus of this section. Although a great deal of discussion has occurred regarding prevention of disproportionate minority representation, little systematic study of prevention efforts has appeared in the literature. Preventative efforts have varied from simple admonitions to educational personnel to change referral and placement patterns to court bans on overrepresentation in certain programs. Prevention plans have had mixed success in changing patterns of disproportionate minority representation in general and special education programs.

Disproportionate minority representation in educational programs occurs through different mechanisms and procedures depending on the nature of the program. Overrepresentation in special education, the principal focus of this paper, occurs through a complex process with multiple steps. Special education eligibility is determined individually, with procedural safeguards embedded at several points in the process. As noted in the prior section, there are distinct stages in the special education eligibility process, each of which is governed by complex legal requirements that are designed to ensure that only those children who are eligible for a disability diagnosis **and** in need of special education are diagnosed as disabled and placed in a special education program. In the author's experiences with multiple districts in several states, disproportionate minority representation is the culmination of decisions made about individual students. Efforts to change the disproportionate minority representation in special education must focus on the individual steps in the complex eligibility process. A number of court orders and reform efforts have done just that, with mixed success in changing patterns of disproportionate minority representation in special education.

Diana and Guadalupe Consent Agreements

The *Diana* (1970) and *Guadalupe* (1972) focused on the assessment process used with Hispanic and, in *Guadalupe*, Hispanic and Native American Indian children and youth. The consent agreements involved requirements that non-verbal tests be used and that the IQ cut off for MMR be lowered to two standard deviations below the mean. The change to a performance or non-verbal IQ changed substantially the proportions of Hispanic and Native American children eligible for the diagnosis of MMR (Reschly & Jipson, 1976) and, at the same time, increased the proportions Hispanic and Native American Indian

children potentially eligible for the SLD diagnosis because these groups typically obtain non-verbal IQ scores at or only slightly below the population mean. The most recent evidence indicates that Hispanic children and youth are significantly under-represented in special education and that Native American Indian children are, at most, slightly over-represented in special education (U.S. Department of Education, 1994).

Current representation patterns for these two groups are quite different from the situations brought to light in the *Diana* and *Guadalupe* cases. It is important to note here, however, that systematic data on disproportionate minority representation in special education was not available prior to 1968 which, according to Finn (1982), was the first year that OCR surveyed program representation patterns in school districts. I was unable to locate any published analyses of the OCR surveys of school districts prior to the 1978 survey which was analyzed extensively by Finn(1982) and included in the comparisons made by Chinn and Hughes (1987). Due to these gaps in the literature, it is impossible to know whether the overrepresentation cited in the *Diana* and *Guadalupe* cases was an isolated phenomenon or a general pattern. Because we do not know the typical special education representation patterns for Hispanic and Native American Indian children prior to 1970, it is impossible to know whether the *Diana* and *Guadalupe* consent agreements changed Hispanic and Native American special education representation generally or only in the districts directly involved in the litigation.

The representation patterns with Hispanic and Native American Indian children suggest, with the limitations just cited, that influencing a component of the process, in this case, assessment procedures, can influence disproportionate minority representation. Although it is tempting to attribute the entire change in representation to assessment reforms, other influences may also have played a role. With Hispanic children and youth, the widespread use of bilingual programs may have provided an additional alternative for students experiencing difficulties in general education. If bilingual programs are used as an alternative to special education, the under-representation of Hispanic children may be explained in part or in total by the availability of this alternative rather than changes in assessment patterns. To my knowledge, there are no studies of whether the availability of bilingual programs is related to the under-representation of Hispanic children in special education programs. Greater availability of general education alternatives is one of the promising developments regarding prevention of disproportionate minority representation in special education.

Reevaluation Projects

A number of studies have been conducted of the effects of reevaluation projects undertaken as a result of anticipated legal pressures or changes in policies instituted by state or local officials. Generally reevaluation projects have produced significant reductions in numbers of students classified as MMR as a result of more stringent classification criteria or markedly different assessment procedures. If changes were not made in classification criteria or in evaluation procedures, the reevaluation programs produced few if any changes in the populations classified as disabled.

An ambitious reevaluation project was carried out, and studied carefully in Corpus Christi, Texas. The impetus for the reevaluation project came, at least in part, from pressure by OCR concerning overrepresentation of minority students in special class programs for the MMR. In addition to more stringent IQ and achievement criteria, the reevaluations were conducted using the System of Multicultural Pluralistic Assessment (SOMPA) (Mercer, 1979a, b). SOMPA procedures produced massive de-classification of both minority **and** majority group students. The effect was virtual elimination of the population previously classified as MMR because hardly anyone, despite having previously met stringent IQ and achievement criteria, qualified according to the SOMPA adaptive behavior and pluralistic IQ norms (Fisher, 1978, 1979).

Later studies of the declassified students (Fisher, 1979; Scott, 1979) indicated that about half of them could be reclassified as eligible for other disabilities, usually SLD or SED. These findings suggest that one of the long term effects of reevaluation programs is to change the special education classification for many students, rather than permanent dismissal from special education. The re-classification appeared to occur about equally with African-American, Hispanic, and white students, so that the degree of disproportionate minority representation in special education was not changed appreciably.

Although the research record is rather sparse, the available studies would suggest that reevaluation of minority students classified as MMR leads to substantial changes in the MMR population if markedly different criteria are applied or if substantially different assessment procedures are utilized. Clearly, the numbers of students in MMR can be reduced by these devices and, in some instances, overrepresentation is markedly reduced, if not limited. However, elimination of MMR overrepresentation is accompanied by virtual elimination of the MMR category, a change that may or may not be in the best interests of children depending on the crucial question of the outcomes of MMR classification and placement.

Alternative Criteria and Assessment Procedures

Several studies have been reported of the effects of alternative criteria and assessment procedures on new referrals or on randomly selected samples of students. One of the changes in the area of MMR over the past 15 years has been the development of more stringent classification criteria, particularly in the states where legal pressure occurred due to placement bias court cases or scrutiny from OCR. It appears that more stringent classification criteria, for example, in California where the top IQ score for MMR was changed from 79 to 70, sharply reduces the number of students potentially eligible for the classification of MMR. It is instructive to note that seemingly small changes in the IQ criterion have enormous effects on the number of children potentially eligible for the diagnosis of MMR. The proportions of students with IQs below 79, 75, and 70 are approximately 8.08%, 4.75%, and 2.28%, respectively. A few points on the IQ criterion can reduce the proportions of students potentially eligible by half or more, for example, reducing the IQ cut off from 75 to 70,

The proportions of students who would obtain IQs below specific points provides information on the numbers of children who are **potentially** eligible for the MMR diagnosis. All studies of special education placement indicate that the proportions actually diagnosed as MMR are significantly below the proportions of students potentially eligible on the IQ criterion (Reschly & Jipson, 1976). For example, in the Heller et al., (1982) report it was noted that although the ratio of African-American to white students in EMR programs was 3.4:1, the ratio of black to white students eligible on the IQ criterion was about 8:1 (Heller et al., 1982, pp. 42-43) These results verify indirectly the assertion that factors other that IQ are important in determining MMR placement of students with minority characteristics.

The most drastic change in the MMR population results from application of alternative assessment procedures, particularly the system developed and strongly advocated by Mercer (1979a). Mercer's influence on this area through the Riverside Epidemiological Study (Mercer, 1973), numerous journal articles and book chapters, hundreds of workshop and convention presentations on non-biased assessment, and publication of the SOMPA should not be underestimated. Mercer also, implicitly, strongly advocated a different conception of MR. For Mercer, MR was to be reserved for persons who exhibited biological anomalies, and for whom the prognosis was likely to be life-long status as disabled. Moreover, Mercer argued that people should not be classified as MMR unless they are deficient in most, if not all, social roles and community settings. In order to understand Mercer's influence, as well as the logic underlying the development of the SOMPA

instruments and criteria, it is necessary to recognize her view of MMR. This view is significantly different from the semi-official classification system established by the American Association on Mental Retardation over the past 35 years (Grossman, 1973, 1977, 1983; Heber, 1959, 1961; Luckusson et al., 1992).

The alternative assessment procedures as well as the decision rules recommended by Mercer were applied in several studies including the Corpus Christi, Texas research reported above, where massive de-classification resulted for all groups. Tally (1979) reported on the effects of applying SOMPA instruments and criteria to all new Hispanic and white referrals in the Pueblo, Colorado schools over a one-year period. The effect was dramatic. Of the small number of students who met the MMR criterion of IQ less than or equal to 69, nearly all failed to meet either the SOMPA adaptive behavior criterion or the SOMPA pluralistic IQ criterion. The largest effect was with the SOMPA adaptive behavior measure which, alone, de-classified virtually all of the Hispanic and white students who obtained IQ scores below 70 and who had been referred, presumably, due to chronic poor achievement.

Similar results were reported by Reschly (1981) in a large randomly selected sample of white, African-American, Hispanic, and Native American students. Nearly all the students, from all socio-cultural groups, were declassified using Mercer's SOMPA instruments and criteria, most often by the SOMPA adaptive behavior measure. Clearly, SOMPA procedures do not eliminate overrepresentation as much as they abolish MMR as a diagnostic construct, a finding replicated by Heflinger, Cook, and Thackrey (1987). The critical question is whether this drastic change is in the best interests of students, a question which cannot be resolved without consideration of effects of special education programs for MMR and other students with disabilities.

Alternatives in General Education

The development of more alternatives in general education for children and youth experiencing academic and behavioral problems is often suggested as an important protection against misclassification and excessive identification of students as disabled. An example of the emphasis on general education alternatives is the top recommendation by the participants at the recent OSEP sponsored Project Forum.

> Prereferral strategies should be an integral part of the educational process and made available to service providers prior to the initiation of a formal assessment; training should be provided in this area. (*"Disproportionate Representation"*,1995)

Although prereferral interventions are nearly universally recommended in the

literature and required by most states, vast differences exist in the rigor, quality, and persistence of intervention efforts in general education (Flugum & Reschly, 1994). In many cases the prereferral intervention step is a perfunctory exercise that hardly ever prevents consideration of special education eligibility and need. Most of the prereferral services lack essential components of a good intervention (Tilly & Flugum, 1995). Improving the quality of prereferral interventions is one of the most important current challenges to improving general and special education (see discussion below).

Another way to improve general education's capacity to deal effectively with children experiencing learning and behavior problems according to the Project Forum report was,

> Training should be provided to address the diverse learning strengths and needs of an increasingly heterogeneous student population, including training in the area of parent/ professional collaboration; family members from diverse cultural and linguistic backgrounds should be used as resources. ("Disproportionate Representation",1995)

This, too, is an area in which the gap between the available knowledge and current practices is quite large, due principally to the lack of monies to train, monitor, and support parents so that they can exert a stronger and more positive influence on their children's education (Christenson & Conoley, 1992). The potential role and impact of families is enormous, as revealed in the positive results obtained in "poor" schools with new immigrant Asian-American children. Family support for these children was strong, and the outcomes were positive despite the poor neighborhoods and the understaffed and poorly funded schools attended by Asian-American children (Caplan, Choy, & Whitmore, 1992).

Improving the Quality of Prereferral Interventions

As noted above, the typical implementation of the prereferral step in the current delivery system does not meet basic standards for the quality of interventions. Standards for the quality of problem solving efforts and interventions have been developed in recent work of persons in the Iowa Department of Education and Iowa Area Education Agencies as well by other Iowa professionals (Tilly & Flugum, 1995). Standards are established for nine components of problem solving and intervention. Each of the nine components is further defined through establishment of key features and a scale that defines different levels of quality. The nine components and the quality indices for one of the nine steps appear in Tables 15 and 16, respectively.

Table 15. Prereferral Intervention Steps

1) Precise definition of the problem in terms of observable behaviors;

2) Development and implementation of a measure of the problem behavior, usually in the natural setting in which the problem behavior occurs; (see criteria below)

3) Validate the existence of the problem and estimate its severity, typically through comparisons to others who are similarly situated;

4) Formulation of intervention goals in terms of the target behavior(s);

5) Analysis of the antecedent (including prior knowledge), situational, and consequent conditions around the behavior;

6) Formulation of an intervention plan, based on principles of behavior change and/or instructional design, that is intended to improve performance;

7) Systematic implementation of the intervention along with continuous monitoring of performance in terms of the target behavior;

8) Revision of the intervention as needed according to performance in relation to goals;

9) Evaluation of the intervention, with further problem solving if the improvement in behavior does not reach goals;

Table 16. Criteria for Step 2: Systematic Data Collection

Definition: Systematic data collection is a process for collecting meaningful, relevant information about a problem. It requires the development of assessment questions, selection of data collection tool(s) appropriate to answer the question, and the use of these tools to collect data.

Benchmarks:

- The data-collection procedure is based on assessment questions which determine the nature of the data to be collected.
- The data-collection procedure is multi-dimensional. Data are collected from multiple settings (small group and large group activities, classroom, playground, etc.), using multiple sources of information (learner, teachers and parents), with multiple methods of data collection (review, interview, observe and/or test), as appropriate to the specific nature of the problem.
- The data-collection procedure is relevant to the stated problem. Data are collected that are specific to the identified behavior(s) of concern.
- The data-collection procedures focus on alterable variables (characteristics of the learner and/or educational setting that can be changed).
- The data-collection procedures allow for frequent and repeated measurement.
- The data-collection procedure is technically adequate. It is both reliable (repeatable) and valid (measure what is intended) in regard to the identified behavior(s) of concern.
- Data collection includes at a minimum: a direct measure of the behavior(s) of concern in the setting where it is problematic and measures of variables that may contribute to or maintain the problem behavior.
- The data that are collected provide appropriate quantitative and qualitative descriptions of the problem behavior(s) and of relevant demands in the setting.
- The data yield a quantitative discrepancy between the level of the problem behavior(s) and relevant educational setting demands.
- The data are used to form (plan and monitor) interventions.

The nine components are important aspects of effective interventions. A 1990 study in Iowa revealed significant deficiencies in the typical general education interventions provided to children and youth with learning and behavior problems that eventually resulted in referral for an evaluation of special education eligibility and need. For example, the first step in effective problem solving, defining the problem precisely in terms of observable behaviors, was accomplished well in **less than 30% of the cases!** (Flugum & Reschly, 1994). Needless to say, the other steps, absent the essential foundation of a precisely defined target behavior, were similarly completed in a haphazard and non-systematic fashion. For general education interventions to realize the promise of improving capacity to deal effectively with learning and behavior problems, much better implementation of the problem solving steps is crucial.

Summary

1. Efforts to prevent patterns of minority under- and overrepresentation are widely regarded as promising approaches to disproportionate minority representation in special education. To date, little evidence exists on the success of different prevention methods.
2. General education interventions are often seen as the most effective method to prevent disproportionate minority representation in special education.
3. Although most states now require general education interventions, most of these interventions do not incorporate the key components of high quality and effective interventions.
4. Improving intervention quality is the next step in efforts to implement general education interventions as a possible alternative to disproportionate minority representation in special education.
5. Quality indices have been developed for the purpose of improving general education interventions. Rigorous implementation of these quality indices will improve the quality and success of general education interventions.
6. An unanswered question, however, is whether effective general education interventions will provide sufficient support to children with learning and behavior problems to prevent, rather than merely delay special education eligibility determination and placement.

Part VI: Changing the Acceptability and Ensuring the Effectiveness of Special Education

The dilemma of the acceptability of special education was introduced in Section III. No answers were suggested at that point purposely to allow some time for the consideration of the questions and to set the stage for this section, a consideration of the acceptability of special education and ways to ensure that special education services are effective. Why is special education so objectionable to many as a treatment for minority children and youth with chronic and severe learning and behavior problems? Studies conducted to date show that minority children and youth in special education programs are placed there after several years of chronic and severe achievement problems in general education (e.g., Reschly & Wood, 1991; Reschly & Kicklighter, 1985). In these studies special education appeared to be a last, not a first resort for minority children and youth with chronic and severe achievement problems.

Views of Critics

Some critics find special education is less acceptable than other alternatives for children with learning and behavior problems such as Chapter I because:

- Much greater stigma is associated with special education than Chapter I because of the requirement of a disability diagnosis in special education. In Chapter I children are regarded as having achievement problems, but are seen as essentially normal. In contrast, disability diagnosis has the **connotation** of a characteristic that is inherent in the individual which is permanent and biologically based.
- The disability diagnosis of mild mental retardation (MMR), the category in which the overrepresentation is most likely to occur, involves a greater degree of stigma than other special education categories such as SLD and, even, SED (Edgerton, 1967, 1993; Goodman, 1989). Many persons, including some educational professionals, confuse the characteristics of persons with MMR with those of persons with moderate, severe, and profound levels of mental retardation (Reschly, 1988, 1996; MacMillan, Siperstein, & Gresham, 1996), further aggravating the stigma associated with MMR. MMR, in contrast to the other levels of mental retardation, is not

comprehensive in the sense of incompetence in all social roles and settings, is not permanent, and has no identifiable biological basis.

- Assessment of general intellectual functioning with standardized, individually administered tests is a fundamental step in the diagnosis of MMR. The use of IQ tests is especially objectionable some critics because of the association of IQ with hereditarian interpretations by some social scientists of differences between the races (Bay Area Association of Black Psychologists, 1971; Dent, 1976, 1993; Harry, 1994; Hilliard, 1980, 1983, 1992; Jones, 1976, 1988; Williams, 1970, 1974).
- Compared to other students with mild disabilities, especially in comparison to SLD, students in special education due to MMR are more likely to be in self-contained special classes which are interpreted as perpetuating segregated, or reinstating segregated, educational programs when minority children and youth are over-represented in those self-contained classes.
- Finally, self-contained special classes for children and youth with MMR are regarded as ineffective, particularly at the elementary and middle school levels using academic achievement outcomes indicators (Kavale, 1990). Indeed, one of the most important implicit assumptions in the *Larry P.* decisions was that MMR special classes were "dead-end" and inferior programs.

In short, special education is less acceptable because it is viewed as stigmatizing, ineffective, perpetuating segregation, and promoting racist views of minority children and youth. Although counter arguments can be formulated regarding each of these points, there is at least some basis in fact for each of these assertions. Rather than engaging in those arguments which are, in my view, impossible for either side to win unequivocally, attention needs to be focused on ways to make special education acceptable and effective.

Improving the Acceptability of Special Education

The acceptability of special education and problems with special education classification and programming were addressed in the recommendations by the participants in the OSEP sponsored Project Forum ("Disproportionate Representation", 1995). Two of the key factors in acceptability were captured in these recommendations, the fourth and fifth priorities endorsed by the Project Forum participants.

- Funding structures should be flexible to create a seamless system of services that minimizes stigmatization. For example, Chapter I and special education funding should be blended to service students with learning needs.

- A non-categorical system of classification, which focuses on the identification of student needs and the provision of services to address those needs, should replace the current classification system.

According to the Project Forum participants, much of what was objectionable about special education had to do with the classification of children and youth as disabled using stigmatizing terminology such as seriously emotionally disturbed and mildly or educably mentally retarded. These terms are the most stigmatizing of the current special education categories and, as we have seen previously, minority students are most likely to be over-represented in the category of MMR. Changing the classification process is one of the keys to improving the acceptability of special education.

Another key to reducing the special education stigma is the delivery of services in the least restrictive environment, with separation from general education only to the extent necessitated by the conditions required to deliver an effective program to the student. A number of models exist for such services: For some students with disabilities, full-time inclusion in general education is appropriate. For others, special education services that are blended with other remedial and compensatory education services as well as part-time programs such as 30 minutes to 45 minutes assistance in a resource teaching programs, minimize the stigma associated with being in a separate program.

The effectiveness of the special education program is undoubtedly an important factor in determining acceptability. Discussion in an earlier section noted the frequent assumption of the ineffectiveness of special education. Program effectiveness, along with good quality services throughout the entire process, including prereferral, problem solving interventions, exacting implementation of the procedural safeguards and the protection in evaluation procedures provisions, and rigorous annual reviews, all serve as important protections to children. An acceptable special education system for any child must implement well these requirements.

Assessment of Treatment Acceptability

An illustration of how some of treatment acceptability factors might be assessed is provided in Appendix D. Readers are encouraged to complete the vignettes and the exercises that follow. The intent of the illustration is to provoke thought about the conditions that make special education more or

less acceptable for African-American and white children with achievement problems. The author's expectations are that special education programs that do not use formal, pejorative labels and that are delivered to children in as normal an educational environment as possible will be more acceptable, regardless of the race or ethnicity of the student.

System Reform Themes

Themes prominent in the delivery system reform literature are closely related to the fourth and fifth priorities in the Project Forum recommendations ("Disproportionate Representation", 1995). Most system reform statements suggest a much closer relationship between general and special education programs and, where possible, merger of Chapter I and special education resource programs. System reform also involves changes toward non-categorical eligibility and programming, functional assessment, decisions driven by an outcomes criterion, improved quality of general and special education interventions, and rigorous, data-driven problem solving strategies (National Association of School Psychologists, NASP-NASDE-OSEP, 1994; Reschly, 1988; Reschly & Tilly, 1993; Reschly & Ysseldyke, 1995; Tilly, Grimes, & Reschly, 1993). Systematic implementation of these principles virtually guarantees that no child will be in special education for years without demonstration and documentation of positive outcomes.

Good Quality Interventions in General Education

Much of the information in the next two sections has appeared in prior publications and, therefore, will not be discussed extensively here. The importance of good quality interventions, implemented systematically, with data collected continuously and progress monitored, with intervention elements changed depending on progress, followed by evaluation of outcomes, cannot be emphasized excessively. Good quality interventions (see Appendix C) in general education prior to special education are not routinely implemented in schools today (Flugum & Reschly, 1994). The rights and opportunities of all children and youth will be enhanced by efforts to improve general education interventions (Heller, et al., 1982; Reschly & Ysseldyke, 1995). The system reform efforts of the Iowa Department of Education to improve general education interventions are well conceived, with enormous potential to improve services for children with learning and behavior problems.

Special education services and programming likely will be more acceptable IF they **follow** high quality general education interventions. Moreover, some, as yet unknown, but potentially substantial, proportion of referrals to special education will be prevented by good quality general education interventions. The degree to which such interventions can alter

current patterns of overrepresentation is unknown; however, further development of intervention quality and systematic assessment of effects on system-wide variables such as referral rates and representation patterns is needed.

Assessment of Eligibility: Multi-factor and Multitrait-Multimethod Principles

The basic principles of a miltifactored assessment and high quality decision making based on the multitrait-multimethod principle are now well-known and, increasingly, implemented in evaluations in public school settings. The major features of these principles are summarized below.

1. Student evaluations must be guided by precisely developed **questions** that serve to organize the assessment activities and the decision making process. Absent such questions, the assessment and decision making are severely constrained and vulnerable to consideration of information that is irrelevant to high quality interventions.

2. Document the use of multiple **methods** to gather information: Review information from records and other sources, Interview significant others such as parents and teachers, Observe behaviors in relevant settings, and Test performance in relevant domains of behavior using curriculum-based and other functional assessment procedures

3. Document assessment of multiple **domains** of behavior focusing on measures that are functionally related to interventions (achievement, ability, social skills, emotional adjustment, etc.)

4. Document assessment in multiple **settings** (e.g., over the course of two or more school years, or home, neighborhood, and school)

5. Document consideration of information from multiple **sources** (teachers, parents, student, etc.)

6. Document **equal treatment** to all children or, when appropriate, justify the use of alternative procedures. For example, many of the assessment measures routinely used in assessing needs for interventions may be inappropriate for limited English speaking children and youth. Equal treatment means equal in quality, not precisely identical treatment when there are good reasons for using alternatives that improve the assessment and decision making.

7. Apply the **multitrait-multimethod** principle to decision making: When results converge on a particular decision, make that decision. To the degree that the results do not converge toward a particular decision or the assessment results are inconsistent, avoid making a decision with long range

implications for the child's educational programming.

Placement in the Least Restrictive Environment (LRE)

The LRE principle is closely related to the Project Forum fourth priority, that is, blending special and general education programs for students with learning and behavior problems. Maximization of the first priority might involve developing special education programs that are delivered in general education classrooms or through brief pull out programs such as the typical resource teaching program. Special education resource teaching programs and Chapter I pull out programs already have many similarities such as focusing on achievement in basic skill areas, tutoring provided individually or in small groups, and continuation of the child in the general education curriculum, especially at the elementary and middle school age levels. By the late middle school and, even more often, at the high school level, students previously placed in resource teaching programs need increasing amounts of services in order to attain success in the general curriculum.

At some point in high school, many former resource program students transition to a different curriculum that, compared to the general education curriculum, places more emphasis on functional academic skills, social competencies, vocational preparation, and supervised work experiences. The high school programs focusing on these priorities will be different in some important ways from the general education curriculum, but the degree of stigma is lessened because there are several program options in addition to the college preparation curriculum (or there should be several options) and a substantial number of students are in a curriculum with noncollege bound academic emphases. The priorities on functional academic skills, social competencies, vocational preparation, and supervised work experiences are related to early adult adjustment according to research on persons with mild disabilities during the early adult years and, therefore, are justifiable in relation to improving skills and expanding outcomes.

The emphasis on using part-time special education options such as resource programs through the elementary years and, to the extent practicable, as far into the middle and high school years as possible, may reduce some of the stigma associated with special education. This strategy also minimizes the possibility of a child being taken out of the general education curriculum before he/she has ample opportunities to cope successfully with those expectations.

Ensuring Positive Outcomes

Perhaps the single most important influence on the acceptability of special education programs is the ultimate outcomes for children and youth. Ineffective programs are quite rightly

rejected regardless of the representation of different groups. Overrepresentation of minority children and youth in ineffective programs has long been viewed by this author as discriminatory regardless of the procedures by which students were placed in the programs. In a paper published first by the Iowa Department of Education in 1978, the following definitions of non-biased assessment was proposed.

> Succinctly stated, test use is fair if the results are more effective interventions leading to improved competencies and expanded opportunities for individuals. Test use is unfair if opportunities are diminished or if individuals are exposed to ineffective interventions as a result of tests. (Reschly, 1978, p. 33)
>
> If the child's competencies are improved and opportunities expanded as a result of the interventions that follow assessment activities, then assessment is beneficial, of high quality and, by definition, unbiased. (Reschly, 1978, p. 34)

Overrepresentation of minority students in ineffective programs renders the assessment process and decision-making related to program eligibility useless for the individual and discriminatory toward the minority group, a position that has been elaborated in numerous publications and research over the last two decades (Reschly, 1981, 1984, 1987, 1988, 1996, in press; Reschly & Grimes, 1990, 1995; Reschly & Tilly, 1993; Reschly & Ysseldyke, 1995). Absent positive programming outcomes, no assessment or placement practice is beneficial to individuals or to groups.

Much more is known today than in the late 1970s about special education outcomes. First, outcomes for different special education treatments are markedly different (See Table 17). Some very popular treatments such as matching instruction to presumed learner strengths has little or no effectiveness, an example of an idea that makes inherently good sense, but simply does not work according to the research literature. A summary of special education results based on meta-analyses by Kavale (1990) and Fuchs and Fuchs (1986) is reprinted in Table 17.

Table 17[a]. Summary of Effect Sizes in Meta-Analyses of Placements and Interventions (Fuchs & Fuchs, 1986; Kavale, 1990).

Placement/Intervention	Effect Size[b]
MMR Diagnosis/Special Education Placement	-.14
SLD Diagnosis/Special Education Placement	.29
Modality Matched Instruction (Auditory Strength)	.03
Modality Matched Instruction (Visual Strength)	.04
Behavior Modification/Behavior Therapy (Social Behavior Goals)	.93
Curriculum-Based Progress Monitoring with Formative Evaluation	.70
Curriculum-Based Progress Monitoring with Formative Evaluation and Systematic Use of Reinforcement	1.00

a. The results in this table are abstracted from results reported by Fuchs and Fuchs (1986) and Kavale (1990). Interested readers are referred to those sources for more information.
b. Effect size expresses in standard deviation units the average results of interventions, placements or treatments from many studies.

In addition to programming approach, data-based decision-making throughout all phases of intervention and eligibility determination markedly enhance the quality of interventions and decisions. The methods for data-based decision making are increasingly sophisticated and effective. Data-based decision-making along with the adoption of empirically validated programming practices will enhance the achievement of positive outcomes for all children and youth.

Summary

1. Special education interventions are unacceptable to many. The reasons for the unacceptability involve concerns about the stigma of special education disability categories, the separation of general and special education, the belief that special education involves diminished resources and poorer quality programming, and the assumption that special education programming is ineffective.

2. IQ-based disability categories are especially objectionable to critics of special education. The category of mild or educable mental retardation is the least acceptable of the special education disability categories because it has been IQ-based and, frequently, associated with special classes that are largely separated from general education.
3. Some steps appear promising in improving the acceptability of special education. These steps involve non-categorical eligibility, programming in natural settings such as general education classrooms or relatively brief programming sessions outside of general education, and adoption of procedures to enhance the likelihood of positive outcomes. The ultimate reaction to these steps is not known, that is, special education still may be unacceptable to many critics even if these steps are implemented successfully.
4. The major special education system reform themes address many of the concerns of critics of special education.

Part VII: Summary

The disproportionate minority representation in various educational programs, especially in special education, has been controversial for at least 30 years. Dunn's (1968) assertions persist today in much the same form and substance. Minority students, especially African-Americans, are over-represented today in special education programs. The pattern of overrepresentation is similar as well, occurring primarily in the category of mild or educable mental retardation.

The degree of disproportionate minority representation also is controversial today, as it was in the 1960s. In fact, the actual percentage of African-American children and youth in special education is only slightly above the population average for white children and youth. For example, a recent Office for Civil Rights survey of U.S. school districts reported results indicating that while 9.53% of white students were in special education programs, 11.26% of African-American students were in special education (U.S. Department of Education, 1994). These results are based on OCR sampling procedures which include all large urban districts and a large number, though not necessarily representative sample, of nonurban districts. The overall difference between white and black special education participation is 1.73%, that is, the African-American special education rate exceeded the rate for white students by less than 2%. The disproportionate representation statistics can be presented in many different ways, some of which lead to systematic misperceptions of the actual degrees of overrepresentation. Distinctions must be made between statistics reporting the **percent of group in program versus the percent of program by group**. Interested readers are referred to an extensive discussion and illustration of these different statistics in Section III.

The disproportionate minority representation issues have been addressed by the federal courts throughout the U.S. The overall outcome of the litigation has been markedly contradictory decisions at the district and appellate court levels. No decisions are currently pending at either level and none has been appealed to the U.S. Supreme Court. Contradictory case law regarding disproportionate minority representation is likely to exist into the future unless a case goes to the U.S. Supreme Court or basic laws are changed by Congress. Neither of these events seems likely.

Disproportionate minority representation is part of a society-wide debate on the best way to achieve fairness and equal opportunity to all regardless of race, ethnicity, and gender. Tension arises from two contradictory strategies to achieve

equity: equal results and equal treatment. Both have inherent deficiencies as well as strengths. Neither is directly applicable to special education, but both have implications for how disproportionate minority representation in special education is analyzed and addressed.

Equal treatment is an absolute prerequisite to the achievement of fairness and equal opportunity. Equal treatment methodologies and research should be explored whenever patterns of disproportionate minority representation are identified. Absent equal treatment studies, neither the advocates nor the critics of current representation patterns have any data-based information to guide changes in the system.

A number of promising practices regarding prevention of disproportionate minority representation in special education have been proposed. These practices have not been, however, empirically validated over several school districts, nor effects assessed on overall system variables. Implementation of these practices with systematic evaluation of effects is an absolute prerequisite to data-based decision making at the systems level. Implementation of fads without systematic evaluation of effects can only produce circular trends that give the appearance of change and improvement without the reality of genuine benefit to children and youth.

Finally, more effort is needed to explore the acceptability of special education with various populations, including minority and nonminority parents of students with disabilities, minority and nonminority students with disabilities, minority and nonminority general and special educators, and minority and nonminority advocates or representatives of advocate groups. Special education acceptability appears to be related to reduction of stigma and the delivery of services in as normal an environment as possible while, at the same time, enhancing the effectiveness of those services.

Positive outcomes, defined as demonstrable changes in relevant skills and expanded opportunities for adult success, should be the ultimate criteria for the acceptability of special education as well as the fundamental principle that underlies nondiscrimination in assessment, intervention, and placement. Absent demonstrable positive outcomes, it does not matter much who gets into special education or how they get there, special education is a poor option for the individual and a poor treatment for minority and non-minority students in like measure.

The knowledge base to design and monitor effective individual treatments, to assess effects for individuals and to revise treatments as needed, is better now than at any time in our history. This knowledge is only partially implemented in schools across the U.S. It is to the task improving

outcomes in general and special education that we should devote our primary energy and resources in future efforts to resolve issues related to disproportionate minority representation in educational programs.

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Appendix A

Iowa Nonbiased Assessment Guidelines (1978)

I. PROGRAMMING AND INTERVENTION IN THE REGULAR CLASSROOM.

A. Basic Principle: Prior to referral to special education diagnostic services, solutions to classroom learning and adjustment problems should be attempted in the regular classroom.

B. Basic Principle: Various resource personnel, e.g., remedial reading specialists, curriculum consultants, counselors, psychologists, speech clinicians and social workers, should be available to assist teachers in developing educational procedures for meeting the child's needs in the regular classroom.

Considerations:

1. Are specially trained personnel available to assist classroom teachers and do these personnel provide assistance to teachers in developing alternative procedures in the regular classroom?

2. What changes are made in the regular classroom programs in order to serve children with diverse backgrounds and diverse characteristics?

3. What alternative materials and approaches, independent of special education, exist and have been attempted for children with learning and adjustment problems?

4. In cases, referred to special education services what evidence exists to confirm that attempts were made to solve the problem within the regular classroom? Were special personnel involved? Was an organized plan developed? Was the plan implemented? Was the plan given sufficient time to be successful?

5. Were efforts made to inform parents of the problem and attempted solutions, and were parents given an opportunity to contribute to solutions attempted in the regular classroom?

II. SCREENING AND REFERRAL PHASE.

A. Basic Principle: Prior to formal diagnostic procedures, adequate information should be obtained which establishes the nature and extent of deviation from reasonable expectations.

Considerations:

1. Is the concern related to classroom learning or adjustment stated or restated specifically in behavioral terms rather than in terms of a special education category?

2. Is the concern related to current classroom learning or adjustment supported and illustrated by descriptive samples of behaviors?

3. Is consideration given to and evidence provided concerning the child's strengths within school and in other situations?

4. Are other sources of information considered systematically? Is this information consistent or inconsistent with the referral? Other sources of information should include the educational history (evaluations by previous teachers, previous educational methods and materials used, previous grades), achievement test scores, previous evaluations by support personnel, previous and current social and emotional patterns of behavior, etc.

5. Do the above sources of information confirm the need for consideration of special education alternatives or does the information suggest that solutions should be attempted within the regular classroom?

B. Basic Principle: Parental involvement shall be obtained in all phases of referral, evaluation, and placement. Informed consent and due process procedures should be initiated early and followed throughout. (See Iowa DPI Special Education Rules and Regulations for description of procedures.)

Considerations:

1. Are parents informed of the reasons for the referral in precise, meaningful language?

2. Have all communications been in the primary language of the home?

3. Does the school use a variety of means to solicit active parental representation in all phases of evaluation and staffing? Are parents informed of their rights to examine all relevant records?

4. Are parents provided with information concerning the activities and kind of decisions anticipated in evaluation and staffing along with estimates of time required, and specification of personnel responsible?

III. EVALUATION

A. Basic Principle: The evaluation of children referred for special education services should be conducted by a multidisciplinary team.

Considerations:

1. Is someone assigned the responsibility of coordinating the work of the team members including, a) evaluating the referral, b) determining the kind of information needed, c) assigning appropriately trained personnel to collect the data, d) facilitating communication among the team members?

2. Are interim procedures established for assisting the child and classroom teacher while the evaluation and staffing are conducted?

B. Basic Principle: Multifactored Assessment. Children should be assessed in all areas related to the suspected handicap including, where appropriate, health, vision, hearing, adaptive behavior, sociocultural background, emotional status, academic performance, aptitude (intelligence), language, and psychomotor. No single procedure such as IQ test results is used as the primary source of information, and the assessment procedures are used to identify areas of special educational needs. "Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory." (Public Law 94-142, Section 121a 530, Part b.)

Considerations:

1. Situational Assessment. Is an assessment of the school or classroom environment conducted which includes a behavioral definition of the referral problems? Are data collected on the frequency and magnitude of the problem(s), and a study made of the antecedent, situational, and consequent conditions related to the problem?

2. Health History: Are data collected on physical/ health conditions which may be related to the learning problem? This information would include factors such as developmental history, disease and injury data, sensory status, medications(s) used, and nutrition?

3. Personal and Social Adjustment. Is personal and social adjustment (adaptive behaviors) in the home, neighborhood, and broader community evaluation using formal and informal data collection procedures?

4. Personal and Social Adjustment. Is personal and social adjustment (adaptive behaviors) in the school setting evaluated with formal and informal data collection procedures?

5. Primary Language. Is the child's primary language dominance determined, and are the assessment procedures administered and interpreted in a manner consistent with the primary language data?

6. Social and Cultural Background. Is the sociocultural background of the child assessed systematically, and are the results of other assessment procedures interpreted in light of the sociocultural data?

7. Educational Achievement Norm Referenced. Is educational achievement assessed with norm referenced instruments which yield valid information concerning the child's current performance in relation to grade level expectancies?

8. Educational Achievement Criteria Referenced. Is education achievement assessed with criterion referenced instruments or devices which provide valid information concerning specific skills and deficit areas?

9. Aptitude. Is academic aptitude, i.e., general intelligence, assessed with appropriate instruments available, consideration given to variations in performance over different factors of academic aptitude, and results interpreted in view of strengths and limitations of such measures?

10. Psychoeducational Process. Are psychoeducational processes and motor skills related to learning assessed, and the influence of these factors on the learning or adjustment problem considered. (e.g., attention, eye-hand coordination, language, visual-motor, visual perception, auditory discrimination, etc.)

11 Other Information. Is information from other areas of assessment potentially important to placement and educational programming considered, e.g., career and vocational interests and aptitudes?

IV. Staffing

A. Basic Principles: Placement decisions should be based upon information from a variety of sources (see previous section). Consideration of the information from the multifactored assessment should be documented in the staffing report. Placement decisions should be made by a group of persons including appropriate professional personnel and parents. The least restrictive alternative principle shall guide the selection of option for serving children.

Considerations:

1. What evidence exists which documents the consideration of a broad variety of information, including both strengths and deficits, in determining educational needs and selection of placement options?

2. Does the determination of education needs and selection of placement option include the contributions of relevant professional personnel and parents?

3. Are current educational status and educational needs stated precisely and supported by data?

4. Are alternative options considered for meeting these needs including regular education with or without support services?

5. Are special education eligibility recommendations made in conformance with the criteria for primary handicapping condition as defined in the Department of Public Instruction Special Education Rules and Regulations?

6. In making the special education eligibility recommendations, did the multidisciplinary team consider a broad variety of information including adaptive behavior and sociocultural background? How did this information influence the recommendations concerning goals for intervention and placement option?

7. Are a variety of program options considered in view of the information from the multifactored assessment? For example, using information on adaptive behavior outside of school to choose between special classes and resource options for mild or minimal mental disabilities?

8. What evidence supports the choice of program option as an appropriate alternative for meeting the child's needs?

9. Is an interim plan developed and implemented to assist the child in the regular classroom until the placement recommendations are carried out?

10. Do the special education personnel inform parents of the primary handicapping condition (If any) and explain the full range of available alternatives for meeting the child's needs?

11. Do parents contribute to decisions concerning the objectives of special education services and to choices concerning type of special education service selected.

12. Are there provisions for members of the multidisciplinary staffing team to express opinions which disagree with the decision of the majority? Are the dissenting opinions in written form expressing the reasons for disagreement?

Appendix B

Protection in Evaluation Procedures
(IDEA, 1995, 34 CFR 300)

Reg. 300.530. General

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory. (20 U.S.C. 1412(5)(c))

Reg. 300.531. Preplacement Evaluation (**Comparable to Section 504 Regulation at 34 CFR 104.35(a)**

Before any action is taken with respect to the initial placement of a handicapped child in a special educational program, a full and individual evaluation of the child's educational needs must be conducted In accordance with the requirements of Reg. 300-532.

Reg. 300.532. Evaluation Procedures (**Comparable to Section 504 Regulations at 34 CFR 104.35(b)(1), (2), and (3). Note subparts d, e, and f below do not appear in 504)**

State and local educational agencies shall insure, at a minimum, that

(a) Tests and other evaluation materials

(1) Are provided and administered In the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producers;

(b) Tests and other evaluation materials include those to assess specific area of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

Reg. 300.533. Placement Procedures (**Comparable to Section 504 at 34 CFR 104.35(c). Note section (b) below does not appear in the Section 504 regulations**)

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior,

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) It a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

Comment. Paragraph (a) (1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in Interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist in complying with

the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

Reg. 300-534 Reevaluation (**Comparable to Section 504 at 34 CFR 104.(d)**

Each state and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with Regs. 300.340-300.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under Reg. 300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

Appendix C

Iowa Department of Education Criteria for Problem Solving

CRITICAL COMPONENTS OF PROBLEM SOLVING

Parent involvement

Problem statement

Systematic data collection

Problem analysis

Goal

Intervention plan development

Intervention plan implementation

Progress monitoring

Decision making

QUALITY INDICES FOR NINE PROBLEM SOLVING COMPONENTS

Component I: Parent Involvement

Definition: Active parent participation is an integral aspect of the problem-solving process.

Benchmarks:

1. Parents are invited to participate and are included in the problem-solving process.
2. Parents are informed at all decision making points.
3. Parent involvement and participation is documented.

Component II: Problem Statement

Definition: A problem statement is a behaviorally defined description of a problem within an educational setting. It defines the degree of discrepancy between the demands of the educational setting and the learner's performance.

Benchmarks: The problem behavior is:

1) Stated in specific terms (precisely defined).

2) Stated in concrete, observable terms (described as actions that may be seen or heard).

3) Stated in measurable terms (identified as occurrences that can be counted reliably).

4) Relevant domains (learner, curriculum, instruction, educational setting) are examined through systematic data collection.

5) Dimensions of the behavior (frequency, intensity, duration, latency, and accuracy) and the educational setting demands are defined.

6) Degree of discrepancy between the demands of the educational setting and the learner's performance is determined.

7) Problem statement focuses upon alterable variables (characteristics of the learner and/or the environment that can be changed).

Component III: Systematic Data Collection

Definition: Systematic data collection is a process for collecting meaningful, relevant information about a problem. It requires the development of assessment questions, selection of data collection tool(s) appropriate to answer the question, and the use of these tools to collect data.

Benchmarks:

1. The data-collection procedure is based on assessment questions which determine the nature of the data to be collected.

2. The data-collection procedure is multi-dimensional. Data are collected from multiple settings (small group and large group activities, classroom, playground, etc.), using multiple sources of information (learner, teachers and parents), with multiple methods of data collection (review, interview, observe and/or test), as appropriate to the specific nature of the problem.

3. The data-collection procedure is relevant to the stated problem. Data are collected that are specific to the identified behavior(s) of concern.

4. The data-collection procedures focus on alterable variables (characteristics of the learner and/or educational setting that can be changed).

5. The data-collection procedures allow for frequent and repeated measurement.

6. The data-collection procedure is technically adequate. It is both reliable (repeatable) and valid (measure what is intended) in regard to the identified behavior(s) of concern.

7. Data collection includes at a minimum: a direct measure of the behavior(s) of concern in the setting where it is problematic and measures of variables that may contribute to or maintain the problem behavior.

8. The data yield a quantitative discrepancy between the level of the problem behavior(s) and relevant educational setting demands.

9. The data are used to form (plan and monitor) interventions.

Component IV: Problem Analysis

Definition: Problem analysis is the complex process of examining all that is known about a problem for the purpose of identifying alterable variables related to the problem. This information is used to design interventions that have a high likelihood of success.

Benchmarks:

1. Problem analysis is problem centered, rather than learner-centered.

2. Inferences drawn during problem analysis are data-based.

3. Problem analysis focuses only on information relevant to solving problems.

4. Problem analysis focuses on characteristics of educational settings and learners that can be changed, since these are the ones that lead most directly to successful intervention.

5. Problem analysis determines whether a problem is the result of a skill deficit or a performance problem (*can't do* versus *won't do*).

6. Problem analysis involves two or more responsible parties. The number of responsible parties involved is determined by the level of problem analysis being conducted and the decisions being made.

Goal

Definition: A goal is a written statement of projected improvement or remediation of the problem.

Benchmarks A stable and representative sample of the learner's current level of performance is collected, and a problem analysis is conducted, before the goal is written.

1. The goal includes a (measurable, observable, alterable, and specific) behavior, timeline, conditions, and a criterion for acceptable performance.

2. The criterion of acceptable performance is selected based on a comparison between the current level of learner performance and the demands of the educational setting.

Intervention Plan Development

Definition: An intervention plan describes the individualized course of action for addressing a specific problem. Effective intervention plans are based on systematic data collection and problem analysis.

Benchmarks: The intervention plan relates to the defined problem and the review of data. The intervention plan includes documentation of:

1. parental involvement,

2. a measurable goal,

3. a specific description of strategies, procedures, responsible parties, and review dates,

4. a progress monitoring plan,

5. and a decision-making plan for summarizing and analyzing progress-monitoring data.

6. The intervention strategies focus on modifying aspects of the educational setting to improve performance.

7. The intervention strategies are selected based on the nature of the defined problem, parental input, and professional judgments about the potential effectiveness of strategies.

Intervention Plan Implementation

Definition: Implementation involves applying the intervention plan in the way that it was designed.

Benchmarks: The intervention plan is implemented as written.

1. Learner performance data are collected regularly and frequently (1-3 times per week), using systematic data analysis and decision making.
2. Regular and frequent follow-up and professional support is provided with the evaluation of the intervention plan and the data.
3. Modifications in the intervention plan are made on the basis of objective data.
4. Modifications in the intervention plan are made with the agreement of responsible parties.

Progress Monitoring

Definition: Progress monitoring involves the regular and frequent collection and analysis of learner-performance data for the purpose of evaluating the effectiveness of an intervention.

Benchmarks: The intervention plan includes progress monitoring and decision making.

1. A behavior is operationally defined (i.e., measurable, observable, and specific).
2. A measurement strategy is selected that is appropriate to the dimensions of the behavior.
3. The learner's current level of performance is defined.
4. A measurable goal is written that describes the behavior, conditions, and criterion.
5. A progress monitoring graph is developed.
6. Learner performance data are collected and graphed on a regular and frequent basis (1-3 times per week).
7. A systematic decision-making plan is used to analyze the learner's pattern of performance.
8. Modifications in the intervention plan are made as frequently as necessary, based on progress monitoring data.

Decision Making

Definition: Decision making is the systematic procedure by which responsible parties summarize and analyze patterns of learner performance. The analysis assists in making decisions about the effectiveness of an intervention.

Benchmarks: There is documentation of parental involvement.

1. There is a clearly stated decision-making plan that is developed prior to the implementation of the intervention plan.

2. The decision-making plan is the basis for summarizing and evaluating the learner performance data.

3. Decision making includes a plan for regular and frequent support for the implementor(s) with evaluation of data and the intervention plan.

4. Decisions are made with data obtained through regular and frequent progress monitoring.

5. The decision-making plan is implemented regularly to examine the effects of the intervention.

6. The intervention is modified as necessary, based on the analysis of the learner's pattern of performance, and with the agreement of responsible parties.

At the end of the goal period, the decision-making plan and learner-performance data are analyzed to determine the effectiveness of the intervention.

Appendix D

Treatment Acceptability: Special Education Programs

Form A: African-American Student Vignette

Brian is an nine-year old African-American child from an economically disadvantaged environment who is in the second grade. He was evaluated recently for special education eligibility and need. The referral was made by his classroom teacher after two interventions developed through discussions with the building assistance team were not sufficient to enable him to make progress in the lowest reading group. His word attack and sight vocabulary skills in reading are at an early first grade level. His math skills are below his current grade placement. Brian was retained in the first grade. He has received Chapter 1 assistance over the past two years in both reading and math.

In answering the next 18 items, you can assume that the assessment results were consistent with the team decisions described in the items and that the parents participated in and approved the multidisciplinary team's decisions.

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1. Brian was diagnosed as Specific Learning Disabled (SLD) due to a discrepancy between achievement and ability. I am concerned about the stigma of the label of specific learning disabled (SLD).	1	2	3	4	5
2. I believe that the IQ and achievement measures using national norms in the diagnosis of Brian as SLD were **invalid** for him.	1	2	3	4	5
3. Brian was diagnosed as Mildly Mentally Retarded (MMR) due to low IQ and adaptive behavior deficits. I am **not** concerned about the stigma of the label of mild mental retardation (MMR).	1	2	3	4	5
4. I believe that the IQ and achievement measures using national norms in the diagnosis of Brian as MMR were valid for him.	1	2	3	4	5

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
5. Brian was diagnosed as needing special education assistance due to low performance in reading and math and the insufficiency of prereferral interventions. My concern about stigma is reduced if no disability label is attached to Brian as a prerequisite to receiving special education services.	1	2	3	4	5
6. I believe the curriculum-based measures and local norms used to determine that Brian needed special education services were **invalid** for him.	1	2	3	4	5
7. The most appropriate placement is a self-contained classroom with other children with the same disability label.	1	2	3	4	5
8. Brian's **academic** progress in a self-contained class is likely to be **faster** than his progress in general education without special education assistance.	1	2	3	4	5
9. The most appropriate placement is the general education classroom where special education services are brought to Brian.	1	2	3	4	5
10. A special class is better than the general education classroom with special services brought to Brian as a means to enhance his **social** development.	1	2	3	4	5
11. Brian's **academic** progress in a resource program is likely to be **slower** than his progress in general education without special education assistance.	1	2	3	4	5
12. A resource program is better than a special class as a means to enhance Brian's **social** development.	1	2	3	4	5
13. Special education of any kind with African-American children is likely to be discriminatory.	1	2	3	4	5
14. Brian's **academic** progress in a general education classroom with special services brought to him is likely to be **slower than** his progress in general education without special education assistance.	1	2	3	4	5

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
15. The most appropriate placement is a resource-pull out program in which Brian receives small group or individual assistance for 30 to 60 minutes per day.	1	2	3	4	5
16. Special education with African-American children like Brian **is acceptable** if more rapid progress, compared to rate of progress in general education, is documented individually at least monthly.	1	2	3	4	5
17. The best placement for Brian's social development is a self-contained special education class.	1	2	3	4	5
18. Special education **is more acceptable** if standardized IQ and achievement tests with national norms are used rather than curriculum-based measures with local norms in eligibility decisions.	1	2	3	4	5

Form B: Non-Minority Student Vignette

Brian is an nine-year old white child from an economically disadvantaged environment who is in the second grade. He was evaluated recently for special education eligibility and need. The referral was made by his classroom teacher after two interventions developed through discussions with the building assistance team were not sufficient to enable him to make progress in the lowest reading group. His word attack and sight vocabulary skills in reading are at an early first grade level. His math skills are below his current grade placement. Brian was retained in the first grade. He has received Chapter 1 assistance over the past two years in both reading and math.

In answering the next 18 items, you can assume that the assessment results were consistent with the team decisions described in the items and that the parents participated in and approved the multidisciplinary team's decisions.

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1. Brian was diagnosed as Specific Learning Disabled (SLD) due to a discrepancy between achievement and ability. I am concerned about the stigma of the label of specific learning disabled (SLD).	1	2	3	4	5
2. I believe that the IQ and achievement measures using national norms in the diagnosis of Brian as SLD were **invalid** for him.	1	2	3	4	5
3. Brian was diagnosed as Mildly Mentally Retarded (MMR) due to low IQ and adaptive behavior deficits. I am **not** concerned about the stigma of the label of mild mental retardation (MMR).	1	2	3	4	5
4. I believe that the IQ and achievement measures using national norms in the diagnosis of Brian as MMR were valid for him.	1	2	3	4	5
5. Brian was diagnosed as needing special education assistance due to low performance in reading and math and the insufficiency of prereferral interventions. My concern about stigma is reduced if no disability label is attached to Brian as a prerequisite to receiving special education services.	1	2	3	4	5

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
6. I believe the curriculum-based measures and local norms used to determine that Brian needed special education services were **invalid** for him.	1	2	3	4	5
7. The most appropriate placement is a self-contained classroom with other children with the same disability label.	1	2	3	4	5
8. Brian's **academic** progress in a self-contained class is likely to be **faster** than his progress in general education without special education assistance.	1	2	3	4	5
9. The most appropriate placement is the general education classroom where special education services are brought to Brian.	1	2	3	4	5
10. A special class is better than the general education classroom with special services brought to Brian as a means to enhance his **social** development.	1	2	3	4	5
11. Brian's **academic** progress in a resource program is likely to be **slower** than his progress in general education without special education assistance.	1	2	3	4	5
12. A resource program is better than a special class as a means to enhance Brian's **social** development.	1	2	3	4	5
13. Special education of any kind with economically disadvantaged children is likely to be discriminatory.	1	2	3	4	5
14. Brian's **academic** progress in a general education classroom with special services brought to him is likely to be **slower than** his progress in general education without special education assistance.	1	2	3	4	5
15. The most appropriate placement is a resource-pull out program in which Brian receives small group or individual assistance for 30 to 60 minutes per day.	1	2	3	4	5

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
16. Special education with economically disadvantaged children like Brian **is acceptable** if more rapid progress, compared to rate of progress in general education, is documented individually at least monthly.	1	2	3	4	5
17. The best placement for Brian's social development is a self-contained special education class.	1	2	3	4	5
18. Special education **is more acceptable** if standardized IQ and achievement tests with national norms are used rather than curriculum-based measures with local norms in eligibility decisions.	1	2	3	4	5

[1]Answer Key: Items 1-10 are false. The correct answer to Item 11 is C, 3%.